No. 80-1663

Office-Supreme Court, U.S.
FILED
APR 3 1981
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. Dixon, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether a union's refusal to handle goods imported from the Soviet Union, prompted solely by that nation's military aggression, is a dispute "in commerce" so as to be within the purview of the National Labor Relations Act?

2. Whether under the doctrine enunciated in *American Radio Association v. Mobile Steamship Association, Inc.*, 419 U.S. 215 (1974), the local effects of a union's action pursuant to an underlying dispute which is recognized not to be "in commerce" may be bifurcated so as to be subject to the National Labor Relations Act?

3. Whether longshoremen's mere refusal, for conscientious and political reasons, to perform services for an aggressor nation may be held to violate the secondary boycott prohibition of NLRA §8(b)(4), 29 U.S.C. §158(b)(4), where it is unaccompanied by any threats, pressure or reprisals against any person who continues to do business with the aggressor?

4. Under the holding in *NLRB* v. *Retail Store Employees Union Local 1001*, —— U.S. ——, 100 S. Ct. 2372 (1980), may an unlawful object violative of NLRA §8(b)(4) be inferred solely and exclusively from effects of a union's action which are equally referable to a lawful purpose?

5. Is action of a union which supports and endorses the desire of its members to refrain from participation in unconscionable activity protected by the First Amendment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et. al.*,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners, International Longshoremen's Association, AFL-CIO ("ILA"), Local 799, ILA, and their respective officers respectfully pray that a writ of certiorari issue to review the opinion, order and judgment of the United States Court of Appeals for the First Circuit in this case.

Opinions Below

The opinion of the court of appeals is not yet reported. It is reproduced herein as Appendix A. The opinion rendered by the district court is reported officially at 492 F. Supp. 334 (D. Mass. 1980).

Jurisdiction

The judgment of the court of appeals was entered on January 6, 1981. Petitioners invoke the Court's jurisdiction under 28 U.S.C. §1254(1).

Statute Involved

The relevant statutory provisions are as follows:

1. Section 8(b) of the National Labor Relations Act, 29 U.S.C. §158(b) provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> . . . .
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, . . . any primary strike or primary picketing; . . .

2. Section 303 of the Labor-Management Relations Act, 29 U.S.C. §187, provides in pertinent part:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

Statement of the Case

On January 9, 1980, Thomas W. Gleason, President of Petitioner ILA, announced that the union had ordered immediate suspension in handling by longshoremen of Russian cargo and Russian ships in all ILA ports from Maine to Texas and Puerto Rico. The action was in response to the "overwhelming demands of the rank and file members of the Union," whose will was to refuse to service the Soviets on account of the invasion of Afghanistan in December 1980 and the concomitant threat to world peace.

The present case is one of many which arose from the ILA action. Respondent Allied International, Inc. ("Allied") is an importer, engaged in the purchase and sale of wood products from the Soviet Union. It utilizes the services of Waterman Steamship Lines ("Waterman"), an American common carrier by sea. In the port of Boston, Waterman uses the services of John T. Clark & Son of Boston, Inc. ("Clark"), a stevedoring company, to dock, load and unload its vessels. Clark employs longshoremen pursuant to the collective bargaining agreement between

the Boston Shipping Association and Petitioners ILA and Local 799. The initial source of longshoremen for Clark's operation is a hiring hall operated by Local 799. If ILA labor is unavailable, the collective bargaining agreement authorizes the use of non-union labor.

On January 9, 1980, Waterman's ship, the *WALTON*, was in Boston unloading part of a shipment Allied had purchased from the Soviet Union. Upon hearing of the ILA's announcement, Allied contacted President Gleason directly and was informed that ILA members would complete unloading the *WALTON*'s cargo at Boston, but would not unload that ship, nor any Soviet cargo, in any other port. In response, Waterman cancelled the *WALTON*'s scheduled calls and unloaded all Allied's cargo in Boston. Rather than pressing Clark to seek non-ILA labor, Waterman and Allied unilaterally restricted the cargo then being loaded aboard another ship in Leningrad to one-third its scheduled size, cancelled its delivery to scheduled United States ports, and unloaded the cargo in Montreal. In addition, Waterman repudiated its agreement to transport Allied's wood products aboard another vessel. Thereafter, the ILA and Local 799 representatives again informed Allied that no ILA members would unload any cargo originating in the U.S.S.R.

On March 31, 1980, Allied filed a complaint in the United States District Court for the District of Massachusetts against petitioners herein seeking injunctive relief and damages under LMRA §303 for an alleged secondary boycott in violation of NLRA §8(b)(4), and alleging violations of the Sherman and Clayton antitrust acts, as well as a common law admiralty tort. On June 17, 1980, the district court granted petitioners' motion to dismiss the complaint for failure to state a claim on which relief could be granted.[1]

[1] Allied also brought unfair labor practice charges against petitioners in Region 1 of the National Labor Relations Board based on

On January 6, 1981, a divided panel of the First Circuit reversed the dismissal of respondent's §303 count and remanded for further consideration of Allied's prayer for damages and injunctive relief. The majority held that the union's action was "in commerce" so as to be within the jurisdiction of the NLRA; that an unlawful object could be inferred solely from the foreseeable effects of the union members' refusal to service the Soviets despite the lack of any allegations of threats, coercion or reprisals against any person; and that the common law admiralty tort claim was preempted. Senior Circuit Judge Aldrich dissented with respect to the jurisdictional holding but would have sustained the common law admiralty count, since there was no jurisdiction under the federal labor law. The panel agreed that the union's action was not protected by the First Amendment and that the antitrust count failed to state a claim. Petitioners now seek a writ of certiorari from this Court to review the First Circuit's decision sustaining respondent's §303 claim.

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the same acts which form the predicate for this case. The instant action and the Regional Director's application for an injunction pursuant to NLRA §10(l), 29 U.S.C. §160(l), were consolidated in the district court. The district court denied an injunction on the ground that the Regional Director had no reasonable cause to believe that the mere refusal to handle Soviet goods violated the Act. *Walsh* v. *ILA*, 488 F. Supp. 524 (D. Mass. 1980), *vacated and remanded with instructions to dismiss on the ground of res judicata*, 630 F.2d 864 (1st Cir. 1980). In dismissing respondent's §303 count in this case, the district court applied its prior holding in *Walsh* as the law of the consolidated case. 492 F. Supp. at 336.

On appeal of the *Walsh* case, the First Circuit held that the district court had erred in failing to give res judicata or collateral estoppel effect to a prior decision, *Baldovin* v. *ILA*, No. H-80-259 (S.D. Tex. Feb. 15, 1980), *aff'd*, 626 F.2d 445 (5th Cir. 1980), which had denied a §10(l) injunction on the ground that the ILA's action was not "in commerce" so as to be subject to the NLRA. The First Circuit remanded with instructions to dismiss the §10(l) petition on this ground. 630 F.2d at 875.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Concerning an Important Question of Federal Jurisdiction Directly Conflicts With a Prior Decision of This Court

The First Circuit's decision with respect to the jurisdiction of the National Labor Relations Act directly conflicts with the decision of this Court in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974) *("Mobile")*. It is a classic example of "bifurcating" the domestic effects and the underlying foreign dispute so as to make the former subject to the Act although the latter is not.

In a series of cases, this Court has articulated the jurisdiction of the national labor act with respect to disputes between American unions and foreign entities.[2] In *Windward Shipping (London) Ltd. v. American Radio Association*, 415 U.S. 104 (1974) *("Windward")*, an American union picketed a foreign vessel in an American port to protest substandard wages paid to foreign seamen. The Texas Court of Civil Appeals denied an injunction on the ground that state court jurisdiction was preempted by the federal act. This Court reversed, holding that the dispute was not "in commerce" and so not arguably subject to the secondary boycott proscriptions of the Act.[3] The rationale for this holding was principles of comity and the fact that

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[2] *Bens* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Incres Steamship Company* v. *International Maritime Workers Union*, 372 U.S. 24 (1963); *International Longshoremen's Ass'n Local 1416, AFL-CIO* v. *Ariadne Shipping Company*, 397 U.S. 195 (1970).

[3] The Court distinguished its earlier holding in *International Longshoremen's Ass'n Local 1416, AFL-CIO* v. *Ariadne Shipping Company, supra.* 415 U.S. at 112, 114. There, although the dis-

> [v]irtually none of the predictable responses of a foreign shipowner to picketing of this type . . . would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate.
> 415 U.S. at 115.

In *Mobile*, a factually similar case, the Court held that the domestic effects of the union's picketing in response to the foreign dispute did not bring it into domestic commerce so as to subject it to the secondary boycott provisions of the Act. The Court refused to adopt the bifurcated view necessary to bring the domestic consequences within the Act, despite its recognition that such domestic effects must occur and might be

> a *crucial part of the mechanism* by which the maritime operations of the foreign ships were to be affected.
> 419 U.S. at 224 (emphasis supplied).

See also Windward, 415 U.S. at 114.

The First Circuit's decision in the instant case manifestly disregards the holding in *Mobile*. The majority of the First Circuit panel agreed, as has every court,[4] that the underlying dispute here is between the ILA and the U.S.S.R. over a political issue not "in commerce." However, it held that the domestic effects of the ILA action could be separated and made subject to the NLRA because "The *only* labor-related activity in issue has been played out by an all-American cast." (App. A at 13a). The fallacy of

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putants were an American union and a foreign entity, the dispute was over the hiring in United States ports of unionized American labor—something clearly within domestic commerce.

[4] *See Hampton Roads Shipping Ass'n* v. *ILA*, 631 F.2d 282 (4th Cir. 1980); *New Orleans Steamship Ass'n* v. *ILA*, 626 F.2d 455 (5th Cir. 1980), *cert. granted, Jacksonville Bulk Terminals, Inc.* v. *ILA*, No. 80-1045, March 30, 1981.

such labelling is evident from the fact that the same observation could have been made in *Mobile*, where the picketing American unions had no relationship to the foreign entity and where suit was brought by American stevedores whose American longshoremen refused to cross the picket lines.

The conflict between the decision in this case and the *Windward/Mobile* holdings is further evident from the fact that, in the related *Walsh* case, *supra*, the First Circuit had correctly interpreted and followed this Court's earlier rulings. There, the court of appeals,[5] in order to reject a distinction urged by the appellant and to find that the preclusionary rules were applicable, was required to interpret *Windward* and *Mobile*. The court said:

> We think these cases indicate that the question of jurisdiction turns not on the registry of the ships, but on the *nature and location of the underlying dispute.* 630 F.2d at 874 (emphasis supplied).

The court acknowledged that, "the Board could not exercise jurisdiction over a secondary boycott where the *primary dispute was outside its jurisdiction.*" *Id.* at 875 n.13 (emphasis supplied).[6] In the instant case, even while finding that the primary dispute was outside the jurisdiction of the Act, the majority found jurisdiction over the domestic effects.

This Court should grant a writ of certiorari to require compliance by the First Circuit with the jurisdictional limits of the NLRA as previously delineated by the Supreme Court.

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[5] The panel in *Walsh* consisted of the two judges who formed the majority in this case and Chief Judge Coffin.

[6] The jurisdictional basis for an NLRA §8(b)(4) proceeding and for a §303 claim are the same.

2. A Writ of Certiorari Is Necessary to Resolve a Conflict Between Circuits With Respect to an Important Question of Federal Jurisdiction

The First Circuit's resolution of the jurisdictional issue is also in direct conflict with a decision of the Fifth Circuit arising out of the identical ILA conduct. In *Baldovin* v. *ILA*, 626 F.2d 445 (5th Cir. 1980), the Fifth Circuit affirmed the denial of an injunction under NLRA §10(l) to restrain the same ILA conduct in the port of Houston, Texas and reversed the granting of a §10(l) injunction to restrain the ILA in Savannah, Georgia. The Fifth Circuit held that under the *Windward* decision the ILA's dispute with the Soviet Union over the latter's military and foreign policy was not "in commerce" so as to fall under the federal labor act and that under *Mobile* the domestic ramifications could not be bifurcated so as to be subject to the Act. The decision for which review is sought directly conflicts with the latter holding.

The First Circuit's decision also conflicts with the approach of the National Labor Relations Board as to the coverage of the Act. In *National Maritime Union of America (Shippers Stevedoring Co.)*, 245 N.L.R.B. 29 (1979) (*"Shippers Stevedoring"*) the Board held that a union's refusal to service Soviet vessels was not "in commerce."[7] More recently, an administrative law judge ordered dismissal of the secondary boycott charges arising in Houston, Savannah and Boston from the ILA's anti-Soviet action.[8]

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[7] The dispute in *Shippers Stevedoring* was over alleged Soviet violations of certain laws of the United States requiring that 50% of certain cargoes be transported on American flag vessels.

[8] *International Longshoremen's Ass'n, AFL-CIO (Kansas Farm Bureau)* Nos. 22-CC-762-1, 763-1, 764-1; *International Longshoremen's Ass'n, AFL-CIO (Occidental Chemical Company)* Nos. 10-CC-1141-1-4; *International Longshoremen's Ass'n, AFL-CIO (Allied International, Inc.)* No. 1-CC-1753. The charges in No. 1-CC-1753 were brought by respondent herein based on the identical conduct on which its §303 count in this case is predicated.

He held that under *Windward/Mobile* the underlying dispute here is not "in commerce" and the domestic effects may not be made subject to Board jurisdiction. A copy of the administrative law judge's decision is reproduced as Appendix B to this petition. (App. B at 38a *et seq.*).

The conflict among the circuits and the NLRB is over the meaning of prior decisions of this Court and indicates the need for further clarification as to the meaning of those holdings. The division of opinion is further reflected in the lower courts, where two of the three district judges reached the same conclusion as the majority of the First Circuit. Thus, there exists among the courts widespread disagreement as to the important question of the jurisdiction of federal labor law. The national scope and importance of this issue are apparent from the fact that the ILA's refusal to service the Soviets is being carried on in 36 ports from Maine to Texas. Because of the inter-circuit conflict the same activity is governed in different ports by different law with respect to the jurisdiction of the same federal statute. This Court should grant a writ of certiorari to resolve the conflict between the circuits and to clarify the meanings of its prior decisions in this important area.

3. A Writ of Certiorari Should Be Granted to Review Important Issues of National Labor Law Involving a Conflict Between Circuits and the Unwarranted Extension of a Decision by This Court

If there is federal jurisdiction, two important questions of national labor law are presented: (1) whether the union conduct here falls within the secondary boycott proscriptions of the Act and (2) whether the unlawful intent necessary to violate §8(b)(4) may be inferred solely from the effects of the union's action? The First Circuit's affirmative answers to both questions require review by this Court.

The decision below that the union conduct here falls within the secondary boycott prohibition of the Act is in direct conflict with the holding of another court of appeals, *NLRB* v. *ILA, ("Ocean Shipping")*, 332 F.2d 992 (4th Cir. 1964). The panel decision expressly recognized its disagreement with the Fourth Circuit (App. A at 22a). Review by the Supreme Court is required to resolve this conflict.

In holding that a union's unlawful object may be inferred solely from the effects of its action, the First Circuit relied on the decision in *NLRB* v. *Retail Store Employees Union Local 1001*, —— U.S. ——, 100 S. Ct. 2372 (1980). In that case, this Court held that "[p]roduct picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss" could be held violative of §8(b)(4). 100 S. Ct. at 2377. The decision below gives that ruling an expansive interpretation and extends it into new and unprecedented areas.

Retail Store Employees involved products picketing. There is no question that the union there freely elected to extend its action against its employer by picketing its product at secondary locations. The question was whether the object of this voluntary action was to engage in publicity picketing protected under the doctrine set forth in *NLRB* v. *Fruit and Vegetable Packers Local 760*, 377 U.S. 58 (1964), or to force a neutral to cease doing business with the union's employer in violation of §8(b)(4). This Court held that the unlawful object of the picketing could be inferred from its effects on the neutral party.

In the case at bar the First Circuit extended this holding so as to make it apply to any alleged violation of §8(b)(4). Despite the fact that there were no allegations or evidence of any kind[9] to show that the union had any motive other

[9] The First Circuit acknowledged that the union had not engaged in any threats or coercion and was willing to continue to handle the non-Soviet cargo even of persons who continue to do business with the U.S.S.R. (App. A at 26a).

than to regulate its own conduct so as not to service the Soviets, the First Circuit held that, under *Retail Store Employees,* an object to involve neutrals in the dispute could be inferred from its necessary and foreseeable effect on them (16a-19a). Such an extension of the holding in *Retail Store Employees* is unwarranted and dangerous.

In the area of products picketing, there is always a deliberate choice by the union to engage in the picketing.[10] It is thus appropriate to look to the effects to ascertain the intent. In the case at bar, the involvement of respondents was something quite beyond the power of the union to control. If the union was to pursue a lawful object—i.e., regulate its own conduct vis-à-vis the U.S.S.R.—other parties must be affected. The effects of the union's action were equally referable to both objects. The First Circuit opted for an unlawful interpretation simply by *fiat*—in effect rewriting §8(b)(4) to read "where an *effect* thereof, etc." rather than "where an *object* thereof, etc."

Review by this Court is appropriate before a doctrine enunciated in a particular and specialized context is transformed into a rule of general application amounting to a presumption of guilt.

4. Important First Amendment Issues in This Case Should Be Reviewed by the Supreme Court

The case at bar involves three distinct but interrelated First Amendment rights: (1) the right of the union to

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[10] Both the other cases relied on by the First Circuit also contained this element of deliberate choice by the union to engage in activity beyond what was strictly necessary to its primary dispute. *NLRB* v. *Twin City Carpenters District Council,* 422 F.2d 309 (8th Cir. 1970) was a *"Tree Fruits"* products picketing case. *NLRB* v. *Local 825, International Union of Operating Engineers,* 400 U.S. 297 (1971) involved pressure on the union's admittedly neutral employer with a question of whether the union's objective was to force cessation of doing business or only to force the employer to use its influence on the union's behalf. 400 U.S. at 304.

engage in passive protest as a means of expression; (2) the right of union members in conscience to abstain from participating in what they deem an immoral endeavour[11] and (3) the right of association in which the union as an entity elects to concur and support those members who in conscience elect to abstain.

The First Circuit's holding with respect to the right of expression aspects directly conflicts with the holding of the Court of Appeals for the Fourth Circuit in *Ocean Shipping, supra.* That case involved the ILA's refusal in the 1960's to load ships used in trade with Cuba. Although the Fourth Circuit decided the case on the ground that the NLRB lacked jurisdiction because no labor dispute was involved, the court went on to consider the merits of the unfair labor practice charge alleged. It ruled that a politically-motivated boycott would not violate §8(b)(4) because "if the bare refusal to work in the circumstances shown should be held illegal, the union would be deprived of its right of expression . . . ." 332 F.2d at 997. The decision of the First Circuit for which review is sought is directly *contra.*[12]

In rejecting the union's First Amendment arguments, the First Circuit failed to distinguish between the right of expression, which is reflected in the publicity proviso of NLRA §8(b)(4) itself, and the right of conscientious

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[11] *Cf. Sherbert* v. *Verner,* 374 U.S. 398 (1963).

[12] The First Circuit's justification for permitting the §8(b)(4) charges to curtail First Amendment rights, that the "union and its members have numerous alternative forms of internal 'expression' left to them" (App. A at 22a) is in direct conflict with decisions of this Court that infringement of freedom of expression may not be justified on the ground that alternative means of communication are open. *See, e.g. Schneider* v. *Irvington,* 308 U.S. 147 (1939).

refusal—not as a means of expression but as the end in itself of not aiding an aggressor.[13]

Ultimately, the merits of this case turn on whether the union's action had as its object forcing others to cease doing business with the U.S.S.R. or governing only its own conduct. The latter would be protected by the First Amendment. By holding that the effects on others, standing alone, were sufficient to make out an unlawful object in violation of §8(b)(4) and that secondary boycotts were not within the constitutional protection, the First Circuit deprived union members of any right in conscience to regulate their own behavior vis-à-vis the Soviets. A decision to decline Russian work must, perforce, affect others, whether intended to or not. In essence, the court of appeals held that by virtue of its strategic location in the chain of commerce the union must enjoy fewer rights under the First Amendment than employer organizations or private groups.

This Court should grant certiorari to review the subtle and sensitive First Amendment issues raised in this case.

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[13] Since this case does not involve any picketing, advertising or other publicity, the conscientious motive, rather than free expression, is paramount.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the First Circuit in this case.

Dated: April 3, 1981

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 80-1425

ALLIED INTERNATIONAL, INC.,

Plaintiff-Appellant,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, *U. S. District Judge*]

Before:

ALDRICH, CAMPBELL and BOWNES,

Circuit Judges.

Duane R. Batista, with whom *Danielle DeBenedictis*, and *Nutter, McClennen & Fish* were on brief, for appellant.

Ernest L. Mathews, Jr., with whom *Charles R. Goldburg, Condon & Doyle*, and *Thomas W. Gleason* were on brief, for appellees.

January 6, 1981

Appendix A

CAMPBELL, *Circuit Judge.* This is an appeal from a decision of the district court denying plaintiff-appellant's motion for a preliminary injunction and granting defendants-appellees' motion to dismiss.[1]

The facts are much like those recently before this court in *Walsh* v. *ILA, Local 799*, 630 F.2d 864 (1st Cir. 1980). Allied International, Inc., is an importer of Russian wood products, which has contracted with two agencies of the USSR for the purchase of birch hardwood and plywood. Allied has also contracted (through a third Soviet agency) with Waterman Steamship Co. for the shipment of these wood products to the United States from the USSR. Waterman employs John T. Clark & Son, a stevedoring company, to unload its ships docking in Boston. Clark's initial source of longshoremen is a hiring hall, operated by defendants International Longshoremen's Association (ILA) and its Local 799 pursuant to a collective bargaining agreement between the unions and the Boston Shipping Association.

On January 9, 1980, one of Waterman's ships, the *Walton*, was in Boston unloading a portion of Allied's plywood and hardwood, prior to further unloading at other ports along the East Coast. On that date, defendant Thomas Gleason, President of the ILA, ordered ILA members to cease handling cargoes bound for or arriving from the Soviet Union, in protest of the invasion of Afghanistan by

[1] Defendants moved to dismiss plaintiff's complaint for failure to state a claim on which relief could be granted. Since, in adjudicating this motion, the district court considered various affidavits submitted by the parties, we will treat the motion as if it were a motion for summary judgment. Fed. R. Civ. P. 12(b).

Soviet armed forces.[2] In response to Allied's inquiries, Gleason informed Allied that ILA members would unload the *Walton*'s cargo in Boston, but not at any other United States port. As a result, Waterman cancelled the *Walton*'s scheduled calls, and unloaded all of Allied's wood products cargo in Boston, where it was stored, accruing demurrage and security charges. Waterman also restricted the cargo then being loaded into the *Middleton* in Leningrad to one-third its scheduled size, cancelled its delivery to scheduled United States ports, and unloaded the wood products in Montreal. In addition, Waterman repudiated its agreement to transport Allied's wood products aboard the *Jefferson*, which had not yet been loaded. ILA and Local 799 representatives informed Allied on March 12 and March 25, 1980 that no ILA members would unload any cargo originating in the USSR.

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[2] The directive stated:

"In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

"This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

"The reason for this action should be apparent in light of international events that have affected relations between the U.S. & Soviet Union.

"However, the decision by the Union leadership was made necessary by the demands of the workers.

"It is their will to refuse to work Russian vessels and Russian cargoes under present conditions of the world.

"People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs."

Appendix A

On March 31, 1980, Allied filed a complaint in the district court alleging that the ILA's actions violated (1) the National Labor Relations Act (NLRA) prohibition against secondary boycotts, section 8(b)(4), 29 U.S.C. § 158(b)(4), for which Allied has a private right of action under section 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, and (2) the Sherman Act, 15 U.S.C. § 1, and (3) constituted tortious interference with Allied's business relationships, in violation of admiralty law. The action was consolidated with *Walsh* v. *ILA*, *supra*, in which the Regional Director of the NLRB sought a preliminary injunction against the ILA Russian boycott. In a memorandum of June 17, 1980, the district court concluded that Allied had failed to state a cause of action on any of its three legal theories, and consequently dismissed the complaint. We examine each of appellant's claims seriatim.

Secondary Boycott

The district court relied on its decision in *Walsh* v. *ILA*, 488 F. Supp. 524 (D. Mass. 1980), in holding that Allied had not alleged a violation of NLRA section 8(b)(4), 29 U.S.C. § 158(b)(4), the secondary boycott prohibition. We did not reach the merits of the secondary boycott question on appeal in *Walsh*, because we considered the issue foreclosed in that case by the decision in *Baldovin* v. *ILA*, Civ. No. 80-259 (S.D. Tex. Feb. 15, 1980). *Baldovin* involved the ILA's refusal to load grain aboard a ship bound for the Soviet Union, and the district court held the NLRB lacked jurisdiction over the dispute because it was not "in commerce." Subsequent to our decision in *Walsh*, the Court of Appeals for the Fifth Circuit affirmed that holding. *Baldovin* v. *ILA*, 626 F.2d 445 (5th Cir. 1980). Because

this case concerns parties different from those in *Baldovin*, that decision has no preclusive effect here. We therefore confront the secondary boycott issue on the merits.

Section 8(b)(4) provides, in pertinent part:

> "(b) It shall be unfair labor practice for a labor organization or its agents—
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ."

We proceed first to the same question decided negatively by the Fifth Circuit in *Baldovin*—whether the secondary activity in question is sufficiently related to commerce to come within the prohibitions of the NLRA. *See* NLRA

§§ 2(6) & (7), 29 U.S.C. §§ 152(6) & (7). While this case does not, as did *Baldovin* and *Walsh*, require consideration of the jurisdiction of the National Labor Relations Board, *see* NLRA § 10(a), 29 U.S.C. § 160(a), the secondary boycott prohibition itself reaches only activities aimed at individuals "employed by any person engaged in commerce or in any industry affecting commerce."

At first blush, it might appear too plain for discussion that the ILA's refusal to unload Allied's goods affects both commerce and a person engaged in commerce. Allied, Waterman and Clark are American companies and the ILA is an American union. All engage regularly in business affecting the transportation of goods among the several states. Indeed, the instant dispute arose when the ILA's actions allegedly impeded Allied's ability to move its wood products from Boston to other ports along the East Coast, and Allied contends that the ILA continues to frustrate its ability to transport its goods into this country.

However, the terms "in commerce" and "affecting commerce," as used in the NLRA, are "obviously not self-defining," *Windward Shipping (London) Ltd.* v. *American Radio Association*, 415 U.S. 104, 112 (1974). They must be considered in light of the gloss placed upon them in a series of Supreme Court cases dealing with the scope of jurisdiction under the Act.

In *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957), the Court held that the protections of the Act did not extend to picketing by American unions in support of a strike staged by foreign seamen against their foreign shipowner-employers. Since Congress did not intend the Act to cover "wage disputes arising on foreign vessels between nationals of other countries," *id.*, at 142, the Act

did not preempt a state law damage action brought by the shipowners against the unions.

While *Benz* relied solely on the legislative history of the NLRA, *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24 (1963), joined the *Benz* rationale to the Act's "affecting commerce" terminology. *Incres*, like *Benz*, considered whether the NLRA deprived a state court of jurisdiction over picketing of foreign-flag ships by American unions in support of a labor dispute between shipowners and a foreign crew. Concluding that "maritime operations of foreign-flag ships employing alien seamen are not 'in commerce' within the meaning of [NLRA] § 2(6)," *id.*, at 27, the Court held that the Act did not protect the picketing from operation of state law. In *McCulloch* v. *Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), a companion case to *Incres*, the Court held that the NLRB had no jurisdiction to order a "representation election" among the foreign crews of foreign-flag vessels.

In contrast, the Court in *ILA, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970), held that picketing directed at foreign-flag ships in order to protest substandard wages paid to non-union American longshoremen *was* arguably protected by section 7 of the Act, and thus not subject to the jurisdiction of the Florida courts. As the Court later described the case, in *Windward Shipping (London) Ltd.* v. *American Radio Association*, *supra*, 415 U.S. at 114, *Ariadne* differed from *Benz* and *Incres* in that the protest "could be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country." In *Windward Shipping* itself, however, the Court again held that picketing foreign ships to protest wages paid to foreign seamen was not activity "affecting commerce," even though the picketing was staged

by American unions not in support of the foreign crew but to publicize the competitive advantage enjoyed by the foreign ships vis-a-vis American shippers which employed American union members. According to the *Windward* Court, the line of cases beginning with *Benz* sought to delineate "the threshold of interference with the maritime operations of foreign vessels which makes the [Act] inapplicable." *Id.*, at 114. Because the pickets in *Windward* "[a]t the very least . . . must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to American shippers," thus occasioning "more than a negligible impact on the 'maritime operations' of these foreign ships," *id.*, the dispute was at root an attempt to interfere with the internal workings of a foreign vessel, the sort of controversy to which the Act had already been held not to apply in *Benz* and *Incres*.

Were this the extent of the precedent before us, we would have little hesitation finding the instant dispute within the coverage of the NLRA. We note that all of the above cases involved the question whether the Act affirmatively protected union activity directed at the working conditions aboard foreign-flag vessels (with the exception of *Ariadne*, in which the Act was found to apply). None considered the scope of the secondary boycott provisions, or whether secondary activity by an American union against an American employer was outside the purview of those provisions simply because "motivated" by a "primary dispute" between the union and a foreign entity. To find that the picketing in *Incres*, *Benz* and *Windward* was protected by the Act would have implied the jurisdiction of the NLRB over the foreign labor conditions that gave rise

to the picketing. This, in turn, "would necessitate inquiry into the 'internal discipline and order' of a foreign vessel, an intervention though likely to 'raise considerable disturbance not only in the field of maritime law but in our international relations as well.'" *ILA, Local 1416* v. *Ariadne Shipping Co., supra*, 397 U.S. at 198 (*quoting McCulloch* v. *Sociedad Nacional de Marineros, supra*, 372 U.S. at 19). In *McCulloch*, the Court confronted an *actual* attempt by the Board to interfere in what was essentially a foreign labor dispute.

In such cases there exist considerations of "comity and accommodation in international trade," *Windward, supra*, 415 U.S. at 113, clearly not present in the instant action. Here, an American union has ordered its members not to work for an American stevedore which had contracted to service an American ship carrying goods of an American importer, insofar as the work would involve handling goods originating in the Soviet Union. There is no question of interference in the affairs of a foreign employer. Moreover, while the work stoppage was motivated by what might be termed a "primary dispute" between the ILA and the USSR over the latter's military policy,[3] it would be

[3] The elusiveness of any attempt to fit aspects of this rather unique case comfortably within the traditional categories of labor law is illustrated by the fact that the "primary dispute" could just as easily, and perhaps more appropriately, be characterized as one between Afghanistan and Russia (or assuming the viewpoint of the ILA, between the Soviet Union and American governments). There is no dispute between the ILA and Russia over matters traditionally thought to be the subject of union concern.

In *Madden* v. *Grain Elevator Workers Local 418*, 334 F.2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965) (discussed *infra*), an American union directed employees of an American grain wholesaler not to load grain onto ships owned by a Canadian employer engaged in a dispute with a Canadian union. There was no suggestion of a primary dispute—or any dispute—between the American union and the Canadian shipper, regardless of the fact

absurd to contend that application of the secondary boycott provisions would imply NLRB jurisdiction over *this* primary dispute, *i.e.*, over Soviet military policy. By the same token, the inability of the NLRB to adjudicate the propriety of the Soviet Union's incursion into Afghanistan need not, at least as a matter of logic, inexorably preclude a finding that the "secondary dispute" on which this lawsuit is based satisfies the jurisdictional requirements of section 8(b)(4). What is at stake is simply whether an American firm is entitled to be shielded by the Act from illegal actions in this country directly affecting its domestic business.

Our consideration of the issue is complicated, however, by the Supreme Court's decision in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974). *Mobile* involved facts similar to those in *Windward*. Six maritime unions engaged in picketing designed to publicize the adverse impact on American seamen of the low wages paid foreign crews working on foreign-flag carriers. In *Windward*, it was the shipowners who had sued the unions, and the Court rejected the unions' claim that the picketing was protected by section 7 of the Act. In *Mobile*, the plaintiffs were American stevedoring companies which sought to service the ships, and the unions defended on the ground that, since the picketing was arguably *prohibited* by section 8(b)(4), state court jurisdiction was preempted. Faced with this attempt to distinguish the

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that the American union may have disapproved of the way in which the Canadian employer was treating Canadian union members. In conventional labor law analysis, the court found the primary dispute to be between the Canadian employer and the Canadian union, and the secondary dispute to be between the American union and the American employer. If the analogy is followed here, the primary dispute is between the USSR and Afghanistan, and the secondary dispute between the ILA and persons carrying Russian-made goods.

controversy between the unions and the ships from that between the unions and the stevedores, the Court rejected the argument "that the line of cases commencing with *Benz* and culminating in *Windward* permit such a bifurcated view of the effects of a single group of pickets at a single site." *Id.*, at 222.

There is language in *Mobile* that can be read as indicating that the reach of the secondary boycott prohibition depends solely on the nature of the underlying "primary dispute" giving rise to the secondary activity. The rejection of a "bifurcated view" of a union's actions might seem to imply that characterizations of the primary dispute as not "in commerce" controls the jurisdictional issue. *See Baldovin* v. *ILA, supra*, 626 F.2d at 452-43. *See also Walsh* v. *ILA, supra*, 630 F.2d at 874-75 & n.13. Indeed, the *Mobile* majority apparently rejected, in the course of discussing precedent relied upon by the four dissenters, "the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its *statutory* authority over unfair labor practices 'affecting commerce.'" *Id.*, at 226.

On the other hand, the Court also said that *Mobile* "need cast no doubt on those cases which hold that the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States. *See Madden* v. *Grain Elevator Workers Local 418*, 334 F.2d 1014 (CA7 1964), *cert. denied*, 379 U.S. 967 (1965); *Grain Elevator Workers Local 418* v. *NLRB*, 126 U.S. App. D.C. 219, 376 F.2d 774, *cert. denied*, 389 U.S. 932 (1967)." 419 U.S. at 225 n.10. *Madden* and *Grain Elevator Workers* both involved the same dispute. A Canadian union was engaged in a labor dispute with a Canadian shipper-employer. In

support of the Canadian union, Grain Elevator Workers, an American union representing employees of the American secondary employer, induced its member-employees to cease loading the American employer's grain onto the Canadian ships. Both courts soundly rejected the contention that the NLRB lacked jurisdiction over the secondary boycott. As the court said in *Madden*:

> "No attempt is being made to regulate or to apply the Act to the 'internal management or affairs' of the Upper Lakes Ships . . . . No conflict between American and Canadian policies can result from halting an illegal secondary boycott in this country, directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer."

334 F.2d at 1019.

We think, likewise, that application of section 8(b)(4) here would portend no interference in the management or affairs of foreign companies, workers, or labor organizations. This case is thus far removed from the situation that faced the Court in *Mobile*. There, the Court was concerned, as it had been in *Windward*, with an attempt by picketing unions to influence the "internal maritime operations of foreign ships." The Court noted that

> "the response of the employees of the American stevedores was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected . . . . The effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same whether it be complained of by the foreign-ship owners

> or by persons seeking to service and deal with the ships."

419 U.S. at 224-25. We read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a "primary dispute" cannot be extricated from a "secondary dispute" for purposes of contrary jurisdictional findings.

Here, however, there is no attempt to "bifurcate" the effects of a single union action. The *only* labor-related activity in issue has been played out by an all-American cast. The fact that this domestic labor dispute was inspired by military events in foreign lands—events far beyond NLRB jurisdiction—does not counsel against application of the NLRA to the labor dispute ongoing here at home. In sum, none of the considerations that prompted the Court in cases such as *Windward*, *Incres*, and *Benz* to find the Act inapplicable have force in this context. We hold, therefore, that section 8(b)(4) applies, and we must thus determine whether the ILA's activities are proscribed by that section.[4]

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[4] Contrary to the suggestion in Judge Aldrich's separate opinion, this conclusion is not dependent on the "result reached." We quite agree that "either an act of Congress covers a particular dispute or it does not"; in our view, however, section 8(b)(4) "covers" this dispute, and we believe that the scope of the *Benz-Mobile* line of cases is narrower than the dissent/concurrence would have it. We understand our brother to construe the *Benz-Mobile* line as reflecting a fundamental principle that Board jurisdiction exists only where the Board has jurisdiction over the primary dispute. But we think those cases are adequately explained on the principle that in a case involving *intertwined* "primary" and "secondary" *labor* disputes, lack of Board jurisdiction over the primary dispute will preclude Board jurisdiction over the secondary conduct—more particularly where a contrary ruling might well suggest an improper interference by the United States in the relationship between foreign employers and laborers. We see no need to extend *Benz-Mobile* beyond this.

Appendix A

In *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 98 (1958), the Supreme Court formulated a three-part test to identify a violation of section 8(b)(4):

> "Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person."

There can be little doubt that the first two parts of this test are met here: it is uncontroverted that the ILA leadership directed ILA members, including members of Local 799, employees of Clark, to engage in a concerted refusal to handle a certain class of goods which Clark had contracted to service. The ILA argues, however, that it lacked an "object" to bring about the entirely foreseeable result of its action—the forced cessation of business between Clark and Waterman, and Waterman and Allied, in relation to Russian goods being transported into this country.

According to the ILA, its "sole object is to vindicate the consciences of its members who find it repugnant to do business as usual with the aggressor and, by passive action, to protest politically the invasion of Afghanistan." [5] However, the ILA has chosen to carry out its goal of protest through action—a selective work stoppage—which by its very nature is designed to force at least partial cessation of business between companies with which ILA has no labor-related grievance. While the ILA boycott may be

[5] Accepting that the boycott sought to protest Soviet aggression, we may still note that this goal of protest was certainly furthered by causing Clark and Waterman to cease handling Allied's Russian-made goods—and was additionally enhanced by Allied's resulting cutback in its trade with the Soviet Union.

a heartfelt act of protest against conduct that the ILA leadership and many ILA members find "repugnant," we cannot accept the proposition that this negates a finding that the "objective" of the boycott is one proscribed by section 8(b)(4). Nor do we think that this section was meant to permit any and all union actions designed to keep union members from "doing unconscionable work" or to protect their "moral integrity, spiritual welfare, and political convictions."

It is well established that a union engages in prohibited secondary activity when it induces employees of a neutral employer to refuse to handle or work on goods originating from or bound for a particular person with whom the union, or another labor group, is having a dispute. *NLRB* v. *Local No. 3, International Brotherhood of Electrical Workers,* 477 F.2d 260 (2d Cir.) (refusal to install material delivered by non-union employees), *cert. denied,* 414 U.S. 1065 (1973); *Grain Elevator Workers Local 418* v. *NLRB,* 376 F.2d 774 (D.C. Cir.) (refusal to load grain on ships owned by Canadian employer embroiled in foreign labor dispute), *cert. denied,* 389 U.S. 932 (1967); *Madden* v. *Grain Elevator Workers Local 418,* 334 F.2d 1014 (7th Cir. 1964) (same), *cert. denied,* 379 U.S. 967 (1965); *NLRB* v. *Local 810, Steel, Fabricators & Warehousemen,* 299 F.2d 636 (2d Cir. 1962) (refusal to work for secondary employer in connection with contract with primary employer against which union conducting strike); *NLRB* v. *Brewery & Beer Distributor Drivers, Local 830,* 281 F.2d 319 (3d Cir. 1960) (refusal to load beer orders bound for companies which had not signed union agreement); *NLRB* v. *Wine Workers Union Local 1,* 178 F.2d 584 (2d Cir. 1949) (refusal by employees of distributors to handle product of company engaged in strike with sister union). Of any of these cases it could be said

that the defendant unions and their members would have found it "repugnant" to facilitate the business of companies they thought were, for example, mistreating brother laborers or paying substandard wages. *Cf. NLRB* v. *Local No. 3, International Brotherhood of Electrical Workers, supra,* 477 F.2d at 263 (concerted refusal to handle said to result initially from "individual acts of conscience"). Yet when a union orders all employees of a neutral employer to cease handling goods originating from a particular source, it is *a fortiori* forcing that employer to "cease doing business with" that source. In such a case, it difficult to say that the cessation of business is not at least *an* object of the union order, in the absence of facts that might indicate the contrary; and it is not necessary that the cessation of business be the *sole* object in order to be an object prohibited under section 8(b) (4), *NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 689-90 (1951).

We think that the object of a boycott, for purposes of section 8(b) (4) (ii) (B), can be inferred from the virtually inevitable results generated by it, at least when, as here, the union's conduct can under no reading of the facts be characterized as "primary activity" protected by the Act.[6]

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[6] The conclusion might be somewhat different in a situation where identical union conduct could be found to be either protected primary activity or unlawful secondary activity depending on the union's objective. For example, in *National Woodwork Mfrs. Ass'n* v. *NLRB,* 386 U.S. 612 (1967), the Court considered whether a union's refusal to handle prefabricated goods was a protected effort to preserve the jobs of union members or activity calculated to satisfy the union's objectives elsewhere. The Court held that once it was found, by reference to circumstances such as "the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry," *id.,* at 644 n.38, that the union action *did* serve the legitimate purpose of work preservation, the conduct could not be held un-

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See NLRB v. *Retail Store Employees Union, Local 1001*, 100 S.Ct. 2372 (1980); *NLRB* v. *Local 825, International Union of Operating Engineers*, 400 U.S. 297 (1971); *NLRB*

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lawful simply because it had the ancillary effect of diminishing business between the employer and the source of the prefabricated materials. *Cf. NLRB* v. *Enterprise Ass'n & General Pipefitters, Local 638*, 429 U.S. 507 (1977) (objective of work preservation will not protect pressure leveled against employer with no power to assign work sought).

The Court recently faced a similar situation in *NLRB* v. *ILA*, 100 S.Ct. 2305 (1980), which involved the ILA's "Rules on Containers," characterized by the Board as a "hot cargo" provision and by the union as a "work preservation agreement." The Court remanded the case to the Board for further consideration, holding that the dispositive issue was whether the agreement had the effect of preserving work of the sort performed by ILA members prior to the era of containerization, and not whether the agreement would displace work performed by truckers and consolidators after the introduction of containerized shipping. In the course of criticizing the Board's treatment of the case, the Court noted that, should the agreement be found to preserve work for union members, it would not matter that it also generated secondary effects:

> "The effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer."

Id., at 2315 n.22. In the context in which this statement was made, it reflects nothing more than a reiteration of the accepted proposition that a union is entitled to engage in primary activity no matter how severe the incidental effects on neutral parties. *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 627 (1967). It should be noted, moreover, that the Court directed the Board to determine whether the agreement had "as its objective" the preservation of work traditionally performed by union members by focusing on the "nature of the work both before and after [containerization]"—*i.e.*, an examination of external facts and circumstances. It was nowhere suggested that the union leadership's subjective "intent" to preserve jobs would save such an agreement that did not, in fact, have the effect of preserving work. The ILA boycott at issue here does not have the *effect* of realizing *any* protected union goal.

v. *Twin City Carpenters District Council*, 422 F.2d 309, 314 (8th Cir. 1970). The Supreme Court recently held, in *NLRB* v. *Retail Store Employees Union, supra*, that section 8(b) (4) forbids secondary picketing against a "struck product" when such picketing "*predictably* encourages consumers to boycott a neutral party's business," 100 S.Ct. at 2374 (emphasis added). In determining whether the union's "object" was one proscribed by section 8(b) (4), the Court not only held that the union was "responsible for the foreseeable consequences of its conduct," *id.*, at 2377 n.9, it did so in a context in which the union's activity—picketing a struck product—differed only in degree from conduct that had already been held to be protected primary activity in *NLRB* v. *Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964). Holding the picketing in *Retail Store Employees* to constitute a forbidden secondary boycott, the Court focused almost exclusively on the nature of the foreseeable injury to neutral parties: "Product picketing that *reasonably can be expected* to threaten neutral parties with ruin or substantial loss simply dos not square with the language or the purpose of § 8(b) (4) (ii) (B)." 100 S.Ct. at 2377 (emphasis added).

It has long been recognized that section 8(b) (4) was enacted for the purpose of "shielding unoffending employers and others from pressures in controversies not their own." *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 627 (1951). Balanced against this congressional objective is the "right of labor organizations to bring pressure to bear on offending employers in primary labor disputes." *Id.* This competing concern is reflected in the proviso of section 8(b) (4) (ii) (B)—which exempts from the section "any primary strike or primary picketing"—and in the affirmative protection accorded pri-

mary union activity under the NLRA. Thus, unions are protected when engaging in primary activity no matter how severe the impact on neutral employers, *id.*, at 627, but are forbidden from pressuring an employer when the pressure is "calculated to satisfy union objectives elsewhere." *Id.*, at 644. *See also NLRB* v. *Enterprise Association & General Pipefitters*, 429 U.S. 507, 528 (1977).

In this case neither of these "dual congressional objectives" would be furthered by finding the ILA boycott beyond the scope of section 8(b)(4). We think it plain that the ILA was not engaged in primary activity and that the boycott against Allied's goods was "calculated to satisfy union objectives elsewhere." The ILA concedes it has no dispute with Clark, Waterman or Allied, and there is no suggestion that it seeks to affect the labor relations of any of these employers. It is also plain that these "unoffending employers" have been embroiled in a "controversy not their own" as a result of union action which "reasonably could be expected" to "threaten a neutral party with ruin or substantial loss," *cf. NLRB* v. *Retail Store Employees Union, supra*, 100 S.Ct. at 2377.[7]

The district court in *Walsh* v. *ILA, supra*, nevertheless held that the ILA boycott did not violate section 8(b)(4) because the "primary dispute" was not a "labor dispute." 488 F. Supp. at 530. In so holding, the court relied in large part on the following language from *Mishara Construction Co.* v. *International Brotherhood of Electrical Workers*,

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[7] The fact that the ILA did not engage in more extensive forms of coercion—*e.g.*, picketing or a total boycott of employers trading with Russia or handling Russian cargo—does not dictate the conclusion that its limited boycott had no proscribed object. *See NLRB* v. *Twin City Carpenters District Council*, 422 F.2d 309, 315 (8th Cir. 1970); *Local 5, United Ass'n of Journeymen* v. *NLRB*, 321 F.2d 366, 370 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963).

554 F.2d 488, 491 (1st Cir. 1977): "the statutory prohibition only applies when employees of a secondary employer are induced to strike or . . . to use other economic pressures against their employer to aid a union that has a dispute with another employer." The district court interpreted this passage to require a dispute with a "primary employer" before a violation of section 8(b)(4) could be found. As the district court noted, however, this statement was made in the course of dealing with an entirely different issue—whether the union had used the sort of "coercive" measures a violation of the section requires.

To be sure, descriptions of the reach of the secondary boycott prohibition are normally couched in terms of union conduct emanating from a primary "labor dispute," since this is the typical situation in which section 8(b)(4) is, and was meant to be, applied. For example, the Supreme Court has said that enactment of the section was prompted by "[c]ongressional concern over the involvement of third parties in *labor disputes not their own.*" *NLRB* v. *Local 825, International Union of Operating Engineers*, 400 U.S. 297, 302 (1971) (emphasis added). However, this language does not suggest that it is permissible under section 8(b)(4) for a union to direct pressure against a neutral employer in order to satisfy objectives unrelated to any "labor dispute" at all. Such an interpretation would be contrary to the congressional purpose behind the section, and we reject it. *Cf. National Maritime Union* v. *NLRB*, 342 F.2d 538 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965); *National Maritime Union* v. *NLRB*, 346 F.2d 411, 416-20 (D.C. Cir.), *cert. denied*, 382 U.S. 840 (1965); *NLRB* v. *Twin City Carpenters District Council*, 422 F.2d 309, 312-13 (8th Cir. 1970); *NLRB* v. *Local No. 751, Carpenters*, 285 F.2d 633, 639 & n.6 (9th Cir. 1960).

Appendix A

We think it more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity. *Cf. NLRB* v. *Washington-Oregon Shingle Weavers' District Council*, 211 F.2d 149, 152 (9th Cir. 1954) (boycott ordered "not because of any dispute, but merely because the union dislikes the producer for any reason, or for no reason, . . . would appear even more reprehensible"). The labor laws do not confer upon bargaining representatives a voice in the conduct of foreign policy. The fact that there have been few, if any, cases that have applied the secondary boycott provisions to activity motivated by a "purely political dispute"[8] illustrates little more than the rarity with which labor unions have seen fit to engage in this sort of "political strike" conduct. The language of section 8(b)(4) and the congressional objectives that prompted its enactment point to no reason why the section should not prohibit such secondary pressure, for whatever reasons motivated. The potential danger of uncontrolled, whimsical activity is obvious. It must be remembered that a union's ability to apply crippling secondary pressure is greatly enhanced by its position under the federal labor laws; without even the justification of a labor-oriented motive, such forbidden secondary activity is *a fortiori* precluded.[9]

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[8] *But cf.* the decision of the NLRB in *Local 1355, ILA and Ocean Shipping Service, Ltd.*, 146 NLRB 723 (1964), *reversed* by the Fourth Circuit in *NLRB* v. *ILA*, 332 F.2d 992 (4th Cir. 1964), discussed *infra*.

[9] The district court also characterized the ILA action as "a primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods." 488 F. Supp. at 531. Clearly this is not the case. The ILA boycott does not differ in this regard

Likewise, we reject the view, apparently adopted by the district court, that section 8(b)(4) may not be applied to national boycotts undertaken as a form of "political expression." To our knowledge, the only other precedent that would support such a sweeping proposition is *NLRB* v. *ILA (Ocean Shipping Services)*, 332 F.2d 992 (4th Cir. 1964), which involved the ILA's refusal, during the height of the Cuban missile crisis in 1962, to load ships that were trading or had traded with Cuba. The court decided the case on the ground that the NLRB lacked jurisdiction over the dispute, but "deem[ed] it appropriate to consider further" whether an unfair labor practice had been alleged. The court then suggested that a politically motivated and selective boycott would not violate section 8(b)(4) because "if the bare refusal to work in the circumstances shown should be held illegal, the union would be deprived of its right of expression and the proviso of section 8(b)(4)(ii)(B) would be emptied of meaning." *Id.*, at 997.

We cannot agree that prohibiting the ILA from ordering employees not to handle Russian goods would rob either the ILA or its members of their "right of expression." (Nor can we understand why, in any event, the proviso of section 8(b)(4)(ii)(B) would thereby "be emptied of meaning"; this proviso protects only a "primary strike or primary picketing.") Certainly the union and its members have numerous alternative forms of "expression" left to them, including the right to assemble or leaflet in protest of

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from innumerable refusals to handle "hot cargo" that have been held to be prohibited secondary activity, *e.g.*, *NLRB* v. *Local 3, Int'l Bhd. of Electrical Workers*, 477 F.2d 260 (2d Cir.), *cert. denied*, 414 U.S. 1065 (1973); *NLRB* v. *Wine Workers Union Local 1*, 178 F.2d 584 (2d Cir. 1949); and cases cited at page 12 *supra*. These cases might likewise have been described as boycotts of a primary employer's "goods" with "incidental effects" on the secondary employers that dealt with the goods.

Appendix A

Russian aggression and the right to petition and lobby elected representatives in pursuit of a reassessment of United States foreign policy regarding American-Russian trade.[10] By resorting to coercive tactics against neutral parties, the union has exceeded the bounds of "political expression" in its pure form; indeed, the sort of union-directed work stoppage at issue here is much farther removed from "pure" expression than the peaceful picketing that has been found to violate section 8(b)(4) in numerous cases.[11] *E.g., NLRB* v. *Retail Store Employees Union, Local*

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[10] In response to the Soviet invasion of Afghanistan, the United States government placed certain restrictions on exports to the USSR but did not imppose any restrictions that would limit the importation of Russian wood products. *See generally* President's Message on the State of the Union, 126 Cong. Rec. H. 20, reprinted in [1980] U.S. Code Cong. & Ad. News 112-13.

[11] We also note that the ILA directive orders *all* ILA members to "express themselves" in a manner that may well be contrary to the views of some. *See Hampton Roads Shipping Ass'n* v. *ILA*, Civ. No. 80-186-N (E.D. Va. March 1980), slip op. at 10 ("the Union's position that its action constitute [sic] only the joint expression of its members' opinion . . . is neither factually nor legally supportable. No evidence of a mandate from the Union's membership has been presented, nor did the Union make any effort to notify its members or employees that Union members who wished to work or who did not support this action could ignore the Union's order without fear of retaliation."). *Cf. Abood* v. *Detroit Board of Educ.*, 431 U.S. 209, 234-36 (union may not finance "expression of political views, on behalf of candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative" through assessments paid by employees who object to advancing such ideas). Whatever the rights of individual ILA members to refuse work as an act of conscience—an issue we need not decide—the ILA directive went considerably beyond anything necessary to enable these members to assert such a right. *See Truck Drivers & Helpers Local 728*, 119 NLRB 399, 407 (1957) ("what is here involved is not an assertion of individual right by individuals, but rather the formulation and enforcement by the Respondent Union as a labor organization . . . of a collective policy or program"). *See also NLRB* v. *Local 74, United Bhd. of Carpenters*, 341 U.S. 707, 713 (1951).

1001, supra, 100 S.Ct. 2372; *International Brotherhood of Electrical Workers* v. *NLRB,* 341 U.S. 694 (1951). For this reason we also reject ILA's argument that its concerted conduct, carried out on orders of top union management, is protected by the first amendment. *See also American Radio Association* v. *Mobile Steamship Association,* 419 U.S. 215, 229-31 (1974); *Teamsters Union* v. *Vogt, Inc.,* 354 U.S. 284 (1957).

In conclusion, we hold that Allied has alleged a violation of NLRA section 8(b) (4). We therefore vacate the district court's dismissal of Count I of the complaint, and remand for further consideration of Allied's prayer for damages and preliminary and permanent injunctive relief.

Sherman Act

We next proceed to whether or not the ILA boycott amounts to a violation of section 1 of the Sherman Act. As such a violation would entitle Allied to treble damages, this issue is not mooted by our holding that a cause of action exists under the NLRA. We first consider whether the union's activity falls within the statutory "labor exemption" from the antitrust laws. Clayton Act §§ 6 & 20, 15 U.S.C. § 17 and 29 U.S.C. § 52; Norris-LaGuardia Act, 29 U.S.C. §§ 101-15. In *United States* v. *Hutcheson,* 312 U.S. 219 (1941), the Supreme Court held that, in light of these statutory provisions, the Sherman Act does not proscribe union activity "so long as [the] union acts in its self-interest and does not combine with non-labor groups." *Id.,* at 232. This standard, which has been referred to as the "two-prong test," has been developed in a series of Supreme Court cases. *E.g., Allen Bradley Co.* v. *Local 3, International Brotherhood of Electrical Workers,* 325 U.S. 797 (1945); *United Mine Workers* v. *Pennington,* 381 U.S. 657

(1965); *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975).

While "the test to determine if a union's actions are in its 'self-interest' has not been precisely formulated," the principle that emerges from the above cases is that activities are in the self-interest of a labor organization "if they bear a reasonable relationship to a legitimate union interest." *Adams, Ray & Rosenberg* v. *William Morris Agency*, 411 F. Supp. 403, 410 (C.D.Cal. 1976). In particular, the labor exemption has been applied when the union acts to protect the wages, hours of employment, or other working conditions of its member-employees, objectives that are at the heart of national labor policy. We think the district court was correct in concluding that the ILA's "political dispute" with the Soviet Union does not relate to a "legitimate union interest" as that term has been defined in American labor history and law, and thus that the ILA boycott is not immunized by statute from operation of the antitrust laws.[13]

The question still remains whether the ILA's refusal to handle Russian-made goods is the sort of activity which the Sherman Act was intended to proscribe. Allied seeks to characterize the boycott as a "concerted refusal to deal," and, in a literal sense, it is. On the other hand, there are significant differences between the activity at issue in this case and the sorts of "concerted refusals to deal" that have been found per se unlawful under the Sherman Act.

The classic anticompetitive "group boycott" is a concerted action by competitors at one level to protect themselves from competition by non-group members who seek

[13] There is no real indication that the ILA "conspired" with any non-union group.

to compete at that level. Sullivan, *Handbook of the Law of Antitrust* 230, 261-62 (1977). *See, e.g., Fashion Originators Guild* v. *FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600 (1914). While many of the boycotts that have been found per se illegal have involved the participation of suppliers or customers of the boycotted firm, *e.g., Klor's Inc.* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959), "it is [the] purpose to exclude competition that has characterized the Supreme Court's decisions invoking the group boycott per se rule." *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978). There is no allegation here that the ILA is engaged in an effort to drive Allied out of business or, indeed, that the ILA has any economic or commercial objective in pursuing the boycott of Russian goods.

It is not the motivation for the boycott alone that distinguishes this case from the paradigmatic anticompetitive refusal to deal, but also its scope. ILA members are not refusing to handle any and all goods imported by Allied, in retaliation for Allied's dealings with the Russians. *Cf. Missouri* v. *National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980) (politically motivated boycott of all convention facilities in states that had not ratified proposed equal rights amendment). ILA members have refrained from boycotting any ships not involved in trade with the Soviet Union, including ships owned by carriers which maintain Russian trade elsewhere. The limited scope of the boycott, while it does not immunize the conduct from antitrust scrutiny, is relevant to the question of the significance of the action's anticompetitive purpose or effect.

We think this limited refusal to handle goods, undertaken as a political protest by a labor union acting on its own, and ill-designed as a means of gaining a competitive or

commercial advantage for the union or its members, is not the sort of evil at which the Sherman Act is aimed. The Sherman Act was a product of "the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Apex Hosiery* v. *Leader*, 310 U.S. 469, 442-43 (1940). The Supreme Court has said that "the Act is aimed primarily at combinations having commercial objectives and is applied only to a limited extent to organizations, like labor unions, which normally have other objectives." *Klor's Inc.* v. *Broadway-Hale Stores, Inc., supra*, 359 U.S. at 213 n.7. While we have rejected appellees' claim that the boycott falls within the statutory exemption from the antitrust laws, we nevertheless think that it would be a rare case when, absent a specific anticompetitive object or collaboration with non-labor groups, a mere refusal to work by members of a labor union, even though the result of concerted action, would be held to violate the Sherman Act. *See Hunt* v. *Crumboch*, 325 U.S. 821, 824 (1944) ("It is not a violation of the Sherman Act for laborers in combination to refuse to work"); *Apex Hosiery, supra*, 310 U.S. at 500-504. We hold that the ILA activity at issue here is not sufficient to warrant application of the antitrust laws. *Cf. Marjorie Webster Junior College* v. *Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

This conclusion is fortified, though not compelled, by our finding, *supra*, that the facts alleged make out a violation of LMRA § 303(a), 29 U.S.C. § 187(a). While the prohibitions of labor law and antitrust law overlap to some degree, it

has been said that, in general, "§ 303 was enacted as an alternative to subjecting unions to antitrust liability for secondary activities" amounting to a violation of section 8(b)(4) of the Act. *Mead* v. *Retail Clerks International Association, Local 839*, 523 F.2d 1371, 1376 (9th Cir. 1975). *Cf. Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616, 634-35 (1975); *id.*, at 646 (Stewart, J., dissenting).

Admiralty Tort

Finally, we turn to the claim of tort liability. Allied contends that the ILA boycott wrongfully interfered with its "existing and prospectively advantageous business relationships" and that this amounted to tortious conduct said to be cognizable in admiralty because of its relationship to maritime service, commerce and navigation. *See Carroll* v. *Protection Maritime Insurance Co., Ltd.*, 512 F.2d 4 (1st Cir. 1975). In light of our conclusion that Allied has alleged a violation of LMRA section 303 based on the same facts, we think the claim in tort, whether governed by federal maritime or state common law, cannot stand.

The Supreme Court has held that section 303 displaces state law in private damage actions based on peaceful union secondary activity. *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252 (1964); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1958). We think the rationale behind these cases suggests that in enacting section 303 Congress also meant to supersede any federal common law that might upset the balance carefully drawn between the rights of management and labor in national labor policy. In *Local 20, Teamsters Union* v. *Morton, supra*, 377 U.S. at 261, the Court said that the area of secondary boycotts is one "of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal

relations which they affect must be deemed governed by federal law *having its source in those statutes*, rather than by local law" (*quoting Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942) (emphasis added)). In this context, an admiralty action sounding in tort would function simply as a substitute for "local law," applicable to tortious acts having a sufficient nexus to maritime commerce. No reasons are advanced why such an action should survive enactment of the federal labor laws whereas a similar state action would not. *See Navios Corp.* v. *National Maritime Union*, 236 F. Supp. 657 (E.D. Pa. 1964), *aff'd*, 359 F.2d 853 (3d Cir.), *cert. denied*, 385 U.S. 900 (1966). We hold therefore that the district court properly dismissed Count III of the complaint.

Reversed and remanded.

ALDRICH, *Senior Circuit Judge* (concurring and dissenting).

While I agree with part of the court's thorough opinion, and with the conclusion that plaintiffs are entitled to relief, I feel more comfortable with a different route. For the reasons given by the court I agree that this is not a Sherman Act case. I have doubts, however, whether relief is within the reach of the NLRA.

By my reading, the *Benz* line of cases cited by the court establishes the general proposition that the NLRA does not reach, directly or indirectly, labor controversies in which the "primary" dispute relates to the internal affairs of a foreign entity (in those cases, foreign shipowners). *See American Radio Ass'n* v. *Mobile Steamship Ass'n*, 1974, 419 U.S. 215, 221-26 *(Mobile); Windward Shipping (Lon-*

don) Ltd. v. *American Radio Ass'n*, 1974, 415 U.S. 104, 109-13 *(Windward)* and cases cited. The one exception is where the primary dispute centers around the foreign entity's employment relations with American labor. *See ILA, Local 1416* v. *Ariadne Shipping Co.*, 1970, 397 U.S. 195. This distinction, while couched in terms of whether or not the dispute is "in" or "affecting commerce," stems more basically from the recognition that Congress, in passing legislation to govern domestic labor relations, "simply did not intend . . . to erase longstanding principles of comity and accommodation in international maritime trade." *Windward*, ante, 415 U.S. at 112-13.

If I understand it correctly, the court is willing to extend the NLRA to cover the present, secondary, dispute because the result reached "would portend no interference in the management or affairs of foreign companies, workers, or labor organizations;" indeed, will doubtless avert it. With due respect, I cannot agree. Either an act of Congress covers a particular dispute or it does not; the determination should not depend on the desirability of the ultimate result reached. It is, moreover, happenstance that the court can take this approach. Prior to the Taft-Hartley Act, the labor laws were held to protect secondary boycotts. *United States* v. *Hutcheson*, 1941, 312 U.S. 219. To say that defendants' conduct is a labor matter would then have meant it protected, with the inevitable effect upon the primary dispute. I cannot believe that we would then, given the proposition that the primary dispute involved longstanding principles of comity and accommodation in international maritime trade that Congress did not intend to erase, *Windward*, ante, have extended the act's protection to a secondary boycott designed very significantly to affect it. Equally, I do not believe that the fact that Congress came to have a

broader general view of the labor injunction should be taken to evince an intent for the NLRA to partake in international decisions.

Continuing with *Windward* and *Mobile,* these cases arose out of picketing of foreign-flag vessels by six American maritime unions in order to draw attention to the low wages paid by the vessels to their (foreign) crews—and the consequent competitive disadvantage of American shipping, which had to pay union scale. Longshoremen and other dock workers refused to cross the picket lines to load and unload the ships. Suit was brought, in the state courts,[1] by the foreign owners of two of the ships *(Windward)* and by American stevedores and an American shipper whose crops were waiting to be loaded *(Mobile).* In each case the unions sought to defeat the state court's jurisdiction as preempted by the NLRA. In *Windward,* the Supreme Court rejected the union's contention that their activity was covered by the Act, and protected, by section 7. In *Mobile,* the unions argued that whatever the case in a suit by the foreign shipowners, their activities vis-a-vis the American stevedores and shipper were governed by the NLRA, since they were arguably a secondary boycott prohibited by section 8(b)(4), which declares it an unfair labor practice for a labor organization or its agents

> "(1) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, . . . a refusal in the course of his employment to . . . handle . . . any goods . . . where . . . an object thereof is—
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> • • •

[1] *Windward* and *Mobile* were separate suits, in the courts of Texas and Alabama, respectively, arising out of factually identical activities by the unions in Houston and Mobile.

> (B) forcing or requiring any person . . . to cease doing business with any other person. . . ."

In rejecting this argument, the Court referred to its earlier holding in *Windward* that the picketing, insofar as it was designed to influence the foreign shippers' internal affairs, was not activity "affecting commerce," and stated

> "it would be wholly inconsistent to now hold, insofar as concerns Board jurisdiction over a complaint by respondents, that the employer of the longshoremen who honored the picket line, or the shipper whose goods they did not handle, was in or affecting commerce." 419 U.S. at 224.

Stating it differently, the court rejected "the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its *statutory* authority over unfair labor practices 'affecting commerce,'" (emphasis in orig.) 419 U.S. at 226, and held the propriety, vel non, of the picketing not an NLRA matter.

Mobile, then, looks to the primary dispute: if this is beyond the Board's reach as not "affecting commerce," then so are secondary activities designed to influence its outcome. While this last may be semantically troublesome, it is fully consistent with the notion that the internal management or affairs of foreign entities are none of the Board's business, directly or indirectly. I therefore ascribe less importance than does the court to the *Mobile* Court's dictum that its holding "need cast no doubt on" the *Madden* and *Grain Elevator Workers* cases. 419 U.S. at 225 n.10. To my mind, *Mobile* casts considerable doubt on them. The only analytically significant distinction between these two cases and *Mobile* is that the former involved an actual work

stoppage to force the secondary employer not to deal with the primary, while the *Mobile* defendants induced such action by their secondary picketing. Where section 8(b)(4)(i) applies, it declares unlawful the engaging in, *or* the inducement or encouragement of, a secondary boycott. It is difficult to see how one affects "commerce" more than the other.

To summarize, it seems to me that in looking at the Act clause by clause, instead of as a whole, the court has adopted the approach of the *Mobile* dissent where, again, it was said that "following the literal language of § 8(b)(4)(B) and recognizing the Board's exclusion jurisdiction over the dispute would not in any way undermine the principles of comity emphasized in our decision in *Windward Shipping.*" 419 U.S., ante, at 241-42. That approach did not prevail in *Mobile,* and I would not follow it here. Accordingly I would hold that just as state court, rather than NLRA, jurisdiction existed in *Mobile,* plaintiff must look to our admiralty jurisdiction in the case at bar.

Nor do I find that wanting; the facts in the present case bear an intimate "relationship . . . to traditional maritime activity." *Executive Jet Aviation, Inc.* v. *Cleveland,* 1972, 409 U.S. 249, 261. *See Pino* v. *Protection Maritime Ins. Co.,* 1 Cir., 1979, 599 F.2d 10, 12-13, *cert. denied,* 444 U.S. 900; *Carroll* v. *Protection Maritime Ins. Co.,* 1 Cir., 1975, 512 F.2d 4, 6-9 and cases cited, particularly *O'Connor & Co.* v. *Pascagoula,* S.D.Miss., 1969, 304 F.Supp. 681; *Orient Mid-East Lines, Inc.* v. *Albert E. Bowen, Inc.,* S.D.N.Y., 1966, 255 F.Supp. 627; *Upper Lakes Shipping, Ltd.* v. *ILA,* S.D.N.Y., 1963, 33 F.R.D. 348. Having concluded that this action is not preempted by the NLRA, I would hold that Allied has properly alleged the elements of maritime tort for interference with its contractual relations.

Appendix A

Section 766A of the Restatement (Second) of Torts reads:

> "§ 766A. *Intentional Interference with Another's Performance of His Own Contract.* One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the liability to the other for the pecuniary loss resulting to him."

Most of the requisite elements are easily found in the case at bar and require little discussion. Contrary to ILA's assertion, malice in the sense of ill will need not be shown; intent (knowledge to a substantial certainty) is ordinarily enough. In the case of a remote interference, *see* post, the "motive or purpose" to interfere may be required. *See* Restatement, ante, § 766 comments j, r, s; § 766A comment e; § 767 comment d. However, it is reasonably clear that the ILA's purpose here was to prevent the loading and unloading of Russian and Russian-bound cargos—stated differently, to disrupt Soviet-American trade, of which Allied's contract represented a portion—and while the only ill will may have been directed toward the Soviet Union, the target of the boycott was this trade and, necessarily, this and other contracts. Allied has credibly alleged that it was prevented from or burdened in performing its contract,[2]

[2] The complaint recites that the contract under which the February shipment was made ran out on December 31, 1979, and that a new contract was under negotiation. If Allied has been hampered in the latter, Restatement § 766B (intentional interference with prospective contractual relation) might become relevant.

and has suffered pecuniary loss.[3]

A number of factors persuade me that the ILA's interference was "improper" within the meaning of section 766A.[4] Labor unions, under the protective wing of federal law, have achieved tremendous social and economic power. This is balanced, in labor controversies "in commerce," by protections given management and others—notably, the prohibitions of section 8(b). My conclusion that the secondary boycott provisions of section 8(b)(4) do not apply in no way detracts from the soundness of the general policy, embodied therein, of "shielding unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building & Constr. Trades Council*, 1951, 341 U.S. 675, 692. As the court observes, a labor organization's secondary activity in pursuit of a political goal in no way related to the labor interests of its members may be thought doubly objectionable.

I am further influenced by the same "considerations of comity and accommodation in international trade" which argue against NLRA coverage. The ILA has sought ulti-

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[3] Damages may include lost profits as well as consequential losses. Restatement, ante, § 774A.

[4] Restatement § 767 presents a (nonexhaustive, *see* comment b) list of factors to be considered:

"(a) the nature of the actor's conduct,

(b) the actor's motive,

(c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties."

mately to involve itself in the affairs of a foreign nation—a matter, in my opinion, better entrusted to the State Department than to labor unions. Union activity which unduly interferes with the non-"commerce" policies of a foreign entity is denied the protections of the NLRA, because such an intervention would be "likely to 'raise considerable disturbance not only in the field of maritime law but in our international relations as well.'" *Ariadne*, ante, 397 U.S. at 198, quoting *McCulloch* v. *Sociedad Nacional de Marineros*, 1963, 372 U.S. 10, 19. The protection of this interest alone might strain the limits of Allied's standing and this court's power. However, where we are asked to consider the propriety or impropriety of an injury done to a plaintiff properly before us, this concern diminishes "the social interest in protecting the freedom of action of the actor." Restatement, ante, § 767(c).

The ILA's argument that its boycott is too remote in its effect on Allied to be actionable is undercut by the fact that disruption of Soviet-American trade, of which Allied's business was a part, was not only a predictable and intended consequence of the boycott; it was the primary purpose behind it.[5] In such a case, "remoteness" of the type here is not a bar to recovery. *See* Restatement, ante, § 767 comment h.

Finally, I agree with the court's assessment of the ILA's First Amendment claim. While action may in some cases speak louder than words and receive similar protection, *see Spence* v. *Washington*, 1974, 418 U.S. 405, 409-10 (per curiam), at some point the concrete injury inflicted on others overshadows the expressive content inherent in the

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[5] This fact adequately distinguishes the ILA's cited cases of *Isbrandtsen Co.* v. *Local 1291, ILA*, 3 Cir., 1953, 204 F.2d 495 and *R.J. Caldwell Co.* v. *Fisk Rubber Co.*, 1 Cir., 1933, 62 F.2d 475.

act. If the First Amendment does not protect the inducement of a secondary boycott by picketing, *NLRB* v. *Retail Store Employees Union, Local 1001*, 48 U.S.L.W. 4796, 4798 (June 20, 1980), I do not see how it protects the boycott itself.

I would affirm the district court's dismissal of the NLRA and Sherman Act claims, and reverse its dismissal of the tort claim.

APPENDIX B

Decision of Administrative Law Judge Bernard Ries

JD-100-81
Boston, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

Case No. 1-CC-1753

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

ALLIED INTERNATIONAL, INC.

John S. May, Esq., of Boston, MA, and *Joseph E. Mayer, Esq.,* of Washington, D.C. for the General Counsel.

Duane R. Batisti, Esq. (Nutter, McClennen & Fish), Boston, MA, for the Charging Party.

Herzl S. Eisenstadt, Esq. (Law Offices of *Thomas W. Gleason*), New York, NY, and *Joseph T. Doyle, Esq.,* of Boston, MA, for the Respondents.

Appendix B

Decision

Bernard Ries, Administrative Law Judge:

This matter was heard in Boston, Massachusetts, on August 27-28, 1980. It has two companion cases: *International Longshoremen's Association, AFL-CIO, et al. (Occidental Chemical Company)*, Cases Nos. 10-CC-1141-1, -2, -3 and -4, and *International Longshoremen's Association, AFL-CIO, et al. (Kansas Farm Bureau, American Farm Bureau Federation, Texas Farm Bureau)*, Cases Nos. 23-CC-762-1, -2, -3, -4, 23-CC-763-1, -2, -3, -4, and 23-CC-764-1, -2, -3, and -4, which were heard by the undersigned, respectively, on September 4-5, 1980, in Savannah, Georgia, and on October 27-28, 1980, in Houston, Texas.

The complaints in the three cases have a common theme—that Respondent International and various of its locals violated Section 8(b) (4) (i) (ii) (B) of the Act by announcing and implementing a boycott of Russian ships and cargo in the early part of 1980. Separate hearings were conducted, however, with the Charging Parties in each case confining their participation to the proceeding to which their charges had given rise. No motion having been made that the cases be consolidated for purposes of decision,[1] and since each of the Charging Parties has played a role in only the case of particular interest to it, I shall issue separate decisions in each case. Because of the commonality of many facts and issues in the three cases, reference will be made occasionally to arguments and circumstances in cases other than the present one.

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[1] Prior to the hearings, Respondents had moved that the three complaints be consolidated for hearing. Oppositions filed by the General Counsel and all the Charging Parties led the Associate Chief Administrative Law Judge to deny the motion.

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Briefs were received from the parties in all three cases on or about January 9, 1981. On the basis of the record made at the hearing,[2] my recollection of the demeanor of the witnesses, and the briefs, I make the following findings of fact, conclusions of law, and recommendation.

I. The Issues

On January 9, 1980,[3] two weeks after the invasion of Afghanistan by the Union of Soviet Socialist Republics, Respondent International President Thomas W. Gleason made the following public statement:

> In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.
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> This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.
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> The reason for this action should be apparent in light of international events that have affected relations between the U.S. and Soviet Union.
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> However, the decision by the Union was made necessary by the demands of the workers.

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[2] The transcript of the proceedings is hereby corrected as follows: at p. 9, l. 6, change "it's" to "as;" at p. 47, l. 23, change "we've" to "I've not;" at p. 218, l. 17, change "not" to "know;" at p. 229, l. 23, change "is not" to "not."

[3] All dates hereafter refer to 1980.

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It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.

People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs.

The present complaint alleges that on or about January 9, President Gleason informed Charging Party Allied by telephone that the International would not unload the cargo of a ship carrying Russian goods at any United States port other than the port of Boston. It further alleges that on or about March 12, Respondent Local 799, through its agent Edward Connolly, informed Allied that it would not unload any cargo arriving from the USSR and that until further notice to the contrary was received from Respondent International, the Russian boycott would continue. It is further alleged that on or about March 25, Respondent International, by agents William Hankard and William McNamara, informed Allied that it would not unload any of Allied's cargoes originating in the USSR and that the boycott of such goods would continue until further notice from Respondent International. The conclusion of the complaint is that by the foregoing conduct, the Respondents have induced and encouraged individuals employed by or to be employed by various secondary employers to engage in strikes or refusals to handle goods or commodities and have thereby threatened, coerced, and restrained various secondary employers with an object of forcing the secondary employers to cease handling the products of, or doing business with, the Charging Party and other persons, and of forcing the Charging Party and other employers to cease

doing business with the USSR, or with other persons, all in violation of Section 8(b)(4)(i)(ii)(B) of the Act.[4]

II. Findings of Fact

Charging Party Allied International engages in the importation and sale of wood products. Most of the wood imported by Allied is from the USSR; in 1979, Allied purchased Russian wood valued at some 25 million dollars. The principal port of embarkation for the shipment of Russian wood is Leningrad, and the wood is regularly transported from that location to six American ports, including Boston.

Allied contracts with Waterman Steamship Lines, a New York corporation, to perform the carriage of Russian wood to the United States. Waterman employs three vessels of United States registry, the Walton, the Middleton, and the Jefferson, to transport the Russian wood to America; these three ships spend about three-fourths of their working life carrying goods from Russia to the United States.

Waterman contracts with the Boston firm of Peabody & Lane, Inc., as the ship's agent for its vessels in that port.

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[4] The cited provisions state, in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—. . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . .

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The stevedoring company employed by Waterman to unload ships in Boston is John T. Clark & Son of Boston, Inc. Clark is a member of the Boston Shipping Association, an employer organization which represents the four stevedoring companies in the port of Boston and which is party to a collective-bargaining agreement with Respondent international, Respondent Local 799, and two other ILA locals.

The bargaining agreement makes provision for the establishment of a hiring hall from which Clark obtains its longshore employees. The hiring hall has organized 12 permanent gangs used to load and unload ships, each gang consisting of 20 men. When a gang is incomplete, other individuals may be called to fill in the vacancies. According to John Murphy, an official of the Boston Shipping Association, in the course of a month, perhaps five fill-in employees per day are required. Some of the employees so used are nonunion employees ("scalawags"). While Murphy testified that he has seen as many as 25 nonunion employees present in the hall at one time, he has never heard of an entire gang composed of nonunion individuals. William Hankard, an international vice president of Respondent, also testified that in his 39 years of experience, he has never seen a ship unloaded by an entirely nonunion gang. Murphy testified that certain of the jobs, such as operation of the sling and the winch, are "very specialized" and require experience; Hankard said that while he has seen nonunion employees operating such equipment as forklifts and automobiles, he has not witnessed them operating other kinds of equipment on the docks.[5]

[5] Article 18 of the bargaining agreement provides, in part, "Extra-dock labor may be utilized to fill-out incomplete gangs working at that terminal and/or pier when no additional men required by the Employer are available at the Hiring Hall."

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On January 9, the day on which President Gleason issued his public statement, the Walton arrived in Boston and began discharging a portion of its cargo of Russian wood.[6] Reacting to Gleason's announcement, Edward Gildea, president of Allied, and Morton Waldfogel, Allied's treasurer, placed a telephone call to Gleason to ask him if he would permit the Walton to finish unloading in Boston and then to complete its schedule at the other three ports. Both Gildea and Waldfogel testified, without contradiction, that Gleason said that "he had to draw a line some place" and that while the Boston unloading would be completed, the Walton could be discharged at no other port.[7] The following day, Waterman cancelled the Walton's visit to the other three ports and, instead, discharged the remaining wood in Boston.

Due to the apprehension of Allied and Waterman that longshoremen would not unload Russian wood in any American ports, the Middleton, which was to arrive with a shipment of wood from Leningrad in late January, was diverted to Montreal, where it eventually unloaded its cargo, and the Jefferson, which was in Leningrad, apparently was forced to leave without carrying freight. In late January, because of the attendant uncertainties, Allied and the Russian agency with which it contracts renegotiated their agreements and reduced Allied's purchases of wood by a value of some 16 million dollars.

Allied President Gildea testified, without controversion, that on March 12 he called Edward Connolly, a business agent for Respondent Local 799, to determine whether anything had changed with regard to unloading a ship carrying

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[6] The remainder of the cargo was destined for Wilmington, North Carolina, Charleston, and Houston.

[7] It should be noted that, on cross-examination, Gildea testified that Gleason attributed the boycott decision to "the rank and file."

Russian wood in Boston.[8] Connolly said that he knew of no change and that if there was to be any, it would have to come from International Vice President Hankard. Connolly also stated that Hankard would have to check with President Gleason to ascertain whether ships could be handled in Boston.

John Kaires, a vice president of Allied, testified that he and others met on March 25 with Hankard and William McNamara, another vice president of the International Union. According to Kaires, when Hankard was asked whether the Union would handle Russian cargo in Boston, Hankard replied that the Union position had not changed, but that he would discuss with Gleason at a meeting scheduled to be held the following day in New York "the matter of the possibilities of handling Russian cargo in the port of Boston." Kaires stated that Hankard also said that "the local stevedores did what they were told to do." Hankard testified, and Kaires on rebuttal "absolutely" denied, that in his discussion with Kaires he had referred only to attempting to ascertain in New York whether there had been a change in the desires of the "rank and file" members about the boycott; he did not recall mentioning Gleason to Kaires. It is my belief, based on my impression of the witnesses and the circumstances, that Kaires' version of the conversation was closer to the truth.

It appears that, as of the date of hearing, Allied had been unable to transport Russian wood directly to the United States as a result of the boycott. Apparently, Waterman was only willing to transport cargo from Russia to Canada since the January events.

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[8] The U.S. District Court for the Southern District of Georgia had, on March 4, issued an injunction against the ILA boycott in the ports of Savannah and Brunswick.

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Respondents attempted here, as in the companion cases, to demonstrate that nonunion labor might have been obtained to work the Russian cargo. It seems fairly evident from the testimony that any such effort would have been unavailing. I doubt that a fully-trained gang of 20 nonunion employees could have been found to unload the Walton or the other vessels. I further note that even though Hankard testified that "employers have worked ships in the port of Boston when we've been on strike," he also testified that "scalawags" do not work ships when there is a strike going on because "the ship wouldn't be working."

Respondents undertook at the hearing the bootless task of establishing that Gleason's January statement was merely advisory, and, on brief, they attack "General Counsel's attempt to characterize President Gleason's statement as an 'order'." Since Gleason himself used that word twice in his announcement, and since he even defined the breadth of his directive to provide that loading or discharging currently being done "will be worked until completion," General Counsel's characterization hardly seems ill-founded. Plainly, Gleason intended the statement to be binding on members of the Union; plainly, Gleason intended that they understand it to be obligatory; and plainly, the Union officials who testified so understood it.

There is little support here, as in the other cases, for the related claim that Gleason's directive merely expressed the overwhelming desire of the membership. Hankard did testify, without contradiction, that only a few hours before Gleason's announcement on January 9, he received a call that longshoremen working a ship at Castle Island wanted to leave work because of the Russian cargo they were handling. Hankard said that he went to the ship and quelled the rebellion, and the men continued to perform their work. He also testified, however, that prior to Gleason's state-

ment, he had received no indication of a groundswell for a Russian boycott from any of the eight ports under his jurisdiction. Gleason did not appear in any of these hearings to give testimony about a flood of sentiment pouring in on him from ILA members throughout the nation, and I am inclined to believe that he was not so inundated.[9]

III. Jurisdiction

At the threshold, Respondents interpose a challenge to the assertion of Board jurisdiction in these cases. Relying on a line of opinions issued by the Supreme Court between 1957 and 1974, Respondents contend that the present disputes are not in "commerce" and are therefore beyond the jurisdictional reach of the Labor Board. That the issue presented is a difficult one and that Respondents' contention is respectable can hardly be gainsaid; only recently, faced with the same claim arising out of this very controversy, the Court of Appeals for the Fifth Circuit, construing the Supreme Court precedents, has concluded that the Board is without jurisdiction of this matter, and a divided panel

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[9] As set out hereafter, I have concluded that the complaints in all three companion cases should be dismissed for want of jurisdiction. I shall include the legal discussion of this point only in the instant decision.

Because the relevant facts of the other two cases differ somewhat from the present factual setting, I note that in *Occidental Chemical Company*, the evidence showed that in Savannah, in the aftermath of President Gleason's directive, an ILA local president confirmed that his local would not handle a foreign-flag ship carrying Russian ammonia purchased by Occidental, and a similar incident occurred in Brunswick, where another ILA local president refused to furnish longshoremen for a vessel, perhaps British-owned and perhaps under Liberian registry, bringing Russian potash bought by Occidental; and in *Kansas Farm Bureau*, the testimony established that in Houston, the presidents of two ILA locals indicated that they would not supply longshoremen so that a Russian-chartered Belgian ship could load grain being purchased by the USSR from an American grain dealer.

of the Court of Appeals for the First Circuit has effectively held to the contrary. In these circumstances, it is appropriate to consider in some detail the Supreme Court authorities whose contours are thus drawn into question.

A. *The Supreme Court Cases*

The line began with *Benz et al.* v. *Compania Naviera Hidalgo, S.A.*, 353 US 138. A foreign-owned ship, sailing under a foreign flag, was struck by its foreign-national crew while temporarily in the harbor at Portland, Oregon. Three American unions picketed in support of the crew. The shipowner filed under state law for injunctive relief and damages against the unions. The issue presented to the Supreme Court was whether the Labor Management Relations Act preempted the field so as to leave the trial court without jurisdiction.

The Supreme Court concluded, after review of the legislative history of the Act, that Congress was concerned only with "industrial strife between American employers and employees." Deducing that Congress had no specific intention to make the Act applicable to other than domestic disputes, the Court stated:

> The seamen agreed in Germany to work on the foreign ship under British articles. We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.

The effect of the ruling was to uphold the award of damages by the lower court under Oregon law against representatives of the unions.

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Six years later, the Court decided *McCulloch*[10] and *Incres*.[11] In *McCulloch*, the Supreme Court rebuffed an effort by the Board to hold a representation election among the seamen on certain Honduran-flag vessels which had points of contact with the United States, including ultimate ownership by an American company. The Court adhered to its belief earlier expressed in *Benz* that Congress had failed to give any indication that the Act contemplated Board jurisdiction over "maritime operations of foreign-flag ships employing alien seamen." It noted, in addition, the established rule of international law that the law of the flag state ordinarily governs the internal affairs of the ship; and that, in the case before it, the employees were already represented by another union certified under Honduran law. The Court raised the possibility that sanctioning Board jurisdiction might lead the Board to inquire into the "internal discipline and order of all foreign vessels calling at American ports," which activity "would raise considerable disturbance not only in the field of maritime law but in our international relations as well." It further foresaw "questions of such international import [that] would remain as to invite retaliatory action from other nations as well as Honduras." The Court concluded, as it had in *Benz*, that it would not divine that Congress had in fact exercised such authority in this "delicate field of international relations . . . [without] the affirmative intention of the Congress clearly expressed."

In *Incres*, an American union attempted to organize foreign seamen on two foreign-owned, and foreign-flag,

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[10] *Frank W. McCulloch, Chairman* v. *Sociedad Nacional de Marineros de Honduras*, 372 US 10.

[11] *Incres Steam Ship Company, Ltd.* v. *International Maritime Workers Union, et al.*, 372 US 24.

ships. They picketed the ships, and the foreign shipowner brought an action in the New York courts for damages and injunctive relief. The New York Court of Appeals held that state court jurisdiction was preempted. The Supreme Court reversed, applying the holding of *McCulloch* that "the Act had no application to the operations of foreign-flag ships employing alien crews," and for the first time linking this construction of the Act to the statutory provisions which define the terms "commerce" and "affecting commerce." [12] In the instant case, said the Court, "[T]he IMWU's activities are directly related to Incres' employer-employee relationship, since the very purpose of those activities was the organization of alien seamen on Incres' vessels." The holding below was vacated so that the New York courts might assert jurisdiction.

International Longshoremen's Local 1416, AFL-CIO v. *Ariadne Shipping Company, Ltd., et al.*, 397 US 195, was the next Supreme Court case construing the *Benz* doctrine and the only one thus far to hold that the Act affords pre-

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[12] Section 10(a) provides that the Board is empowered to prevent any person from engaging in any unfair labor practice "affecting commerce." Section 2(6) states:

> The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Section 2(7) provides:

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

emptive jurisdiction over acitvities relating to a foreign-flag vessel. The case involved two foreign-owned, foreign-flag, cruise ships which operated between Florida ports and the Caribbean. When the ships were in American ports, they engaged some American longshoremen to do loading work. An American union picketed the vessels with placards protesting that the longshore work was being done under substandard wage conditions. The Florida courts granted injunctive relief to the foreign shipowners.

The Supreme Court thought that this case differed sufficiently from the ones previously decided so as to permit a conclusion that Congress would have desired that the Board assert jurisdiction in these circumstances. This was not a situation in which Board regulation of the aspect of labor relations in question would necessitate inquiry into the "internal discipline and order" of a foreign vessel which might "raise considerable disturbance not only in the field of maritime law but in our international relations as well." Unlike the prior three cases, invocation of Board jurisdiction in *Ariadne* would not likely provoke "vigorous protests from foreign governments and . . . international problems for our government," or "invite retaliatory action from other nations." Nor was there any showing that such assertion of jurisdiction would depart from "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." The Court, holding that the "longshore activities of such American residents" were not within the exempted area marked out by *Benz* and its progeny, stated:

> [T]his dispute centers on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to

> do casual longshore work. There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law. [Footnote omitted.] They were American residents, hired to work exclusively on American docks as longshoremen, not as seamen on respondents' vessels.

Concluding that "application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law," the Court held that "these longshore operations were in 'commerce' within the meaning of" the Act and that, since the picketing was arguably protected by the Act, Florida law was accordingly preempted.

Four years later, in 1974, the Court decided *Windward Shipping (London) Limited, et al.* v. *American Radio Association, AFL-CIO, et al.*, 415 US 104. In that case, several American maritime unions, concerned about the loss of jobs available to their members, agreed to take collective action against foreign vessels which they perceived as a principal cause of the situation. They picketed two foreign-owned vessels in Houston with signs calling attention to the substandard wages paid to the foreign crews and the consequent plight of American seamen.[13] The effect of the picket-

[13] The signs read:

> Attention To The Public
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> The Wages and Benefits Paid Seamen Aboard The Vessel Theomana [Northwind] Are Substandard To Those of American Seamen. This Results In Extreme Damage To Our Wage Standards And Loss To [sic] Our Jobs. Please Do Not Patronize This Vessel. Help The American Seamen. We Have No Dispute With Any Other Vessel On This Site.

ing was to cause longshoremen and other port workers to refuse to cross the picket lines. The shipowner sought injunctive relief in a Texas court. The Texas Court of Appeals held that the picketing did not interfere with the "maritime operations of foreign-flag ships" under the *McCulloch* standard and that the activity was arguably protected under Section 7 of the NLRA; accordingly, that court denied the request for injunction.

In reviewing *Benz* in *Windward*, the Supreme Court attributed its result not only to the "clear Congressional purpose to apply the LMRA only to American workers and employers," but also to reluctance on the part of the Court "to intrude domestic labor law willynilly into the complex of considerations affecting foreign trade." It further characterized *Benz* and the other cases which had denied jurisdiction to the Labor Board as recognition that "Congress, when it used the words 'in commerce' in the Labor Management Relations Act, simply did not intend that Act to erase longstanding principles of comity and accommodation in international maritime trade." The Court went on to acknowledge that the picketing activities in the case before it did not involve the "inescapable intrusion" into the affairs of foreign ships that was present in *Benz* and *Incres*, since neither the representation of the foreign crews nor support for such crews in their own wage disputes was implicated. However, the Court said, "[T]hose cases do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable." In explaining why that threshold was crossed on the facts before it, the Court stated:

> The picket signs utilized at the docks where the North Wind and Theomana were tied up protested the wages

paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United States. At the very least, the picketers must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. Such a large scale increase in operating costs would have more than a negligible impact on the "maritime operations" of those foreign ships and the effect would be by no means limited to costs incurred while in American ports. Unlike *Ariadne*, the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country.

In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute. Virtually none of the predictable re-

sponses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under *Benz* rather than under *Ariadne*. [Footnote omitted.]

Justice Brennan, joined by Justices Douglas and Marshall, dissented. The dissent construed the majority opinion as holding that the Act did not apply simply "because the *economic impact* upon foreign shipping from respondents' picketing might severely disrupt the maritime operations of foreign vessels," and the dissent contended that in fact the prior cases rested squarely upon quite different, and more limited, criteria—that Congress would have disapproved exercise of jurisdiction only over those cases which allowed "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels." (Emphases in original.) Justice Brennan argued that, under the precedents, the only appropriate issue is whether "NLRB cognizance of respondents' picketing would require that the Board 'inquire into the internal discipline and order' of foreign vessels," and that, under such a test, *Ariadne* would apply here. He also believed that the question of whether the dispute could be accommodated "by a wage decision on the part of the shipowners which would affect only wages paid within this country" was irrelevant because the picketing was not in fact "directed at forcing the shipowner to make that or any other accommodation that could be characterized as interference with relations between crew and shipowners. Respondents' target is to persuade shippers not to patronize foreign vessels, and respondents have no

concern with the form of the shipowner's response that makes their efforts succeed." Justice Brennan went on to point out that the unions' effort to foster use of domestic shipping was entirely consistent with national policies in the maritime field and found it most unlikely that Congress was satisfied to allow the states to resolve the problem, saying, "It is inconceivable that Congress meant to leave regulation of activity in this area of predominantly national concern to disparate state laws reflecting parochial interests."

Later in 1974, the Court was again confronted with a legal issue arising out of the same picketing campaign which had resulted in the *Windward* decision. In *American Radio Association, AFL-CIO, et al.* v. *Mobile Steamship Association, Inc., et al.*, 419 US 215, the unions which had participated in the picketing in the *Windward* case engaged in similar conduct at another port, directed against another foreign ship. The legal posture of the case, however, was different. Whereas in *Windward* the plaintiff in the Texas court had been the shipowner, in *Mobile* the plaintiffs seeking an injunction in the Alabama court were the stevedoring companies which had desired to service the picketed ships and the shippers who had wished to have their crops loaded onto it. In *Windward,* the petitioning unions, seeking to assert Federal preemption, had contended that their Houston picketing was protected under Section 7 of the Act. The same unions contended in *Mobile* that, with respect to the effect of their conduct on the stevedores and the shippers, such conduct arguably constituted a secondary boycott prohibited by Section 8(b)(4) of the Act. The unions attempted, in other words, to persuade the Court that an independent controversy existed between them and the stevedoring and shipping companies which was subject

to the jurisdiction of the Board, despite the fact that the dispute between the unions and the shipowner was not.

The Court majority found anomalous the claim that a state court might have jurisdiction over a complaint filed by a foreign shipowner but would be ousted of jurisdiction when the stevedore with whom the shipowner would have dealt itself sought an injunction against the union for conduct arising out of the same dispute. The majority did not "believe . . . that the line of cases commencing with *Benz* and culminating in *Windward* permit such a bifurcated view of the effects of a single group of pickets at a single site."

The majority noted its previous reference in *Windward* to the effect of the picketing on secondary employers ("lost cargo resulting from the longshoremen's refusal to load or unload the vessels") and the recognition there that the effect of picketing on the "maritime operations of foreign ships" would be produced in large part by the refusal of the American workmen employed by domestic stevedoring companies to cross the picket line in order to load and unload cargo. Such a conclusion, the Court stated in *Mobile*, "inevitably flows from the fact that the response of the employees of the American stevedores was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected." It followed, therefore, that "the fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in *Windward*." In summary, the Court concluded:

> Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom

> the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioners' picketing did not even "arguably" violate §8(b)(4) of the Act. Since Congress did not intend to strain through the filament of the NLRA picketing activities which so directly affect the maritime operations of foreign vessels, we hold that the Alabama courts were competent to apply their own law . . . .

Three members of the Court joined Justice Stewart in dissent. In the view of the dissenters, a substantial difference existed between the issue of "jurisdiction over a dispute between the owners of foreign-flag vessels and American maritime unions" (*Windward*) and "whether state courts have jurisdiction over a complaint by an association of American stevedoring companies that secondary pressure caused by the picketing of American maritime unions constituted a wrongful interference with the American companies' right to carry on their lawful business." The gravamen of the latter complaint, argued the dissent, "is precisely the type of concerted activity made subject to Board regulation by § 8(b)(4)(B) of the LMRA. . . ." If, as in *Ariadne, supra,* it was true that the longshoremen serving foreign-flag vessels are indeed in "commerce" and thus subject to the regulatory power of the Board, their employers must similarly be "engaged in commerce or in an industry affecting commerce" within the meaning of Section 8(b)(4)(B). On the assumption that the majority of the Court would allow the Board to exercise jurisdiction over the secondary aspect of the case had the unions been involved in a primary dispute with American-flag ship-

owners, Justice Stewart found anomalous that the Section 8(b)(4)(B) jurisdictional requirement should depend "entirely on whether in a particular case a primary labor dispute to which the stevedoring company was not privy was between an American union and an American-flag shipowner or an American union and a foreign-flag shipowner."

The dissent perceived no considerations of comity, no intrusion of domestic labor law into foreign trade, and no thrusting of the Labor Board into the delicate field of international relations, by holding that the Board had exclusive jurisdiction over the alleged secondary conduct in the case at hand: "Certainly a Board decision that secondary pressure violated § 8(b)(4)(B) would not risk interference with international maritime trade. Nor would a decision that the secondary pressure did not violate Section 8(b)(4)(B) endanger the foreign-flag shipowners' interests in preserving the integrity of their maritime operations from the impact of the unions' picketing. These interests are fully protected under *Windward Shipping* by permitting the foreign shipowner to seek an injunction in state court."

In arguing that the primary and secondary aspects of the unions' conduct were legally separable for purposes of jurisdiction, Justice Stewart noted that the only two Courts of Appeals that appeared to have addressed the question "have also sustained Board jurisdiction over secondary disputes involving American employers and unions despite the fact that the primary dispute involved foreign-flag vessels," citing *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418*, 334 F.2d 1014 (C. A. 7), and *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418* v. *NLRB*, 376 F.2d 774 (C. A. D.C.). Those two cases arose out of the same controversy. A Canadian union

was involved in a labor dispute with a Canadian shipping company. In order to support the Canadian union in that dispute, an American union which represented employees of an American grain shipper induced its members at an American port to cease loading the American employer's grain onto ships owned by the Canadian employer. In both cases, the Courts of Appeal tersely rejected the contention that the Board, by virtue of *Benz* and *Incres*, lacked jurisdiction over the American union's conduct in this country. The *Madden* Court stated succinctly (334 F.2d at 1019):

> [N]o attempt is being made to regulate or to apply the Act to the "internal management or affairs" of the Upper Lakes ships; the injunction does not regulate the internal affairs of its ship. No conflict between American and Canadian policies can result from halting an illegal secondary boycott in this country, directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer.

In evident response to the citation of the *Grain Workers* cases by the *Mobile* dissent, the *Mobile* majority appended the following footnote to its textual conclusion that "[t]he fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in *Windward*":

> In so holding, we need cast no doubt on those cases which hold that the Board has jurisdiction under Section 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is

located outside the United States. See [the *Grain Workers* cases].

B. *Discussion*

In assessing the applicability of the *Benz-Mobile* doctrine to the instant boycott, two discrete questions may require decision. The first issue is the reach of the *Benz-Windward* line—what are its metes and bounds, what are the pertinent criteria in testing whether union conduct is not in "commerce" so as to deprive the Labor Board of jurisdiction over it. The second question which would arise, in the event of a conclusion that the "primary" dispute here might be considered, under the theories propounded in *Benz-Windward,* beyond the Board's supervisory power, is whether the dispute may nonetheless be subject to Board regulation because of its secondary character, being, it is argued, less like *Mobile* than like the *Grain Workers* cases apparently approved by the *Mobile* Court.

It should be noted that from the point of view of the Respondents and the Charging Parties, the real, practical, essential issue appears to be a narrow one: the choice of forum in which relief will be sought. As the cases reviewed above indicate, a holding that the Board is without jurisdiction leaves those parties which feel aggrieved by the respondents' conduct the alternative of pursuing state court remedies; the cases also suggest that state law may often be more hospitable to claims against unions than the NLRA would be. However, although the pragmatic stakes in the present cases may not be as consequential as the considerable litigation to which the dispute has given rise might suggest, the proper application of the Supreme Court doctrine is an analytical challenge of the first water.

Appendix B

1. The Applicability of *Benz-Windward* (Without Regard to *Mobile*).

Long before *Benz*, it had been accepted that Congress is capable of applying American law to foreign ships voluntarily entering American territorial limits. *Wildenhus's Case*, 120 U.S. 1. Furthermore, it has been said that the "commerce" jurisdiction of the Labor Board is a broad grant by Congress of "the full sweep of its constitutional authority." *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 647. The question in the foreign-flag cases has always been whether it may nonetheless fairly be inferred that Congress, for considerations of national and international importance, intended to impose limitations on the Board's jurisdiction in particular circumstances.

The first cases in this line were much of a piece. It may reasonably be said that *Benz*, *Incres*, and *McCulloch* all concerned efforts by American unions to involve themselves in the labor relations of foreign vessels, with no apparent resultant benefit to American workingmen. The Supreme Court was of the view that in the absence of any expression of affirmative intention, it was inappropriate for the Court to conclude that Congress desired the Court "to run interference in such a delicate field of international relations" "where the possibilities of international discord are so evident and retaliative action so certain." *Benz*, 353 U.S. at 147.[14]

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[14] The repeatedly expressed fear in these cases of disrupting international relations and offending principles of comity does not specifically deal with two factors which seem to make these concerns less threatening. One is that, in all of the cases except *McCulloch*, the only apparent role which the Board might have played, on the facts in each case, would have been the potential issuance or withholding of an injunction against the picketing American union. I am uncertain how the entry of such an order,

In *Windward*, however, the doctrine seemed to take a new tack. Justice Brennan argued in dissent that while the earlier cases had refused to permit "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels," the majority view in *Windward* was withholding Board jurisdiction "because the *economic impact* upon foreign shipping from respondents' picketing might severely disrupt the maritime operations of foreign vessels." 415 U.S. at 118 (emphasis in original). The *Windward* majority seemed to agree that it was engaging in an expansion of the prior cases, conceding that the picketing before it did not "involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*," but holding that those cases "do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable." *Id.* at 114.[15]

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or the failure to enter one, would necessarily constitute a direct intrusion into international affairs. Furthermore, the issue in each case, except *McCulloch*, was whether state law was preempted by the Labor Act. The decisions in *Benz*, *Incres*, *Windward*, and *Mobile* that state laws could be applied would seem to present at least the same threat of international disruption that Board jurisdiction would foretell.

[15] It may be wondered why the majority chose to agree that *Windward* was a somewhat different breed of cat than the prior cases, and to engage in speculation about the economic implications of the picketing there. At least superficially in *Windward*, it might have been said that the American picketing which complained of substandard foreign wages was certainly as intrusive into the foreign employer-employee relationship as was the *Benz* picketing which offered American support to a strike by a foreign crew against its foreign employer; the *Benz* language about exempting from Board jurisdiction an attempt "to change the contractual provisions made by these [foreign] parties," 353 U.S. at 146-147, it would seem, would have fit the *Windward* facts with

Windward thus seemingly broadened the *Benz* principle, at two levels. In addition to conduct or situations which threatened to constitute potential intrusion into foreign labor relations, the *Windward* mode of analysis seemed to remove from Board jurisdiction the regulation of conduct which promised a substantial adverse economic effect upon foreign trade. And, by so expanding the inquiry, the issue no longer focussed on the effect of "Board cognizance of a dispute," or whether the exercise of Board jurisdiction "would require the Board to examine into" foreign labor relations, or whether assertin of Board jurisdiction "would necessitate Board inquiry into the relations" (all the words of dissenting Justice Brennan in analyzing, in *Windward*, the prior cases); the majority rationale in *Windward* spoke only in terms of the potential economic effects of the picketing activities there.

As discussed by the *Windward* majority, there seem to be two principal determinants of whether a *Windward* situation is present: the objective of the union and the predictable impact of its conduct. Thus, the Court stated that "[a]t the very least," the union "must have hoped" to cause the foreign vessels to raise their operating costs, either as a result of losing revenue or of capitulating to the picketing by increasing the wages of the foreign seamen. The end thus presumably desired by the union would have a "more than negligible" impact of the maritime operations of the ships, and could not be "accommodated by a wage decision on the part of the shipowners which would affect only

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a fair degree of comfort. One might assume that the Court refrained from such a mechanical analysis because it perceived that the picketing had a principal objective of shutting out foreign vessels rather than merely making them competitive with the domestic fleet.

wages paid within this country." Further, a decision by the shipowners to increase their seamen's wages would have "the most significant and far-reaching effect on the maritime operations of these ships throughout the world;" absent such a decision, the alternative choice by the shipowners of boycotting American ports "would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as in ours," bringing, in addition, the threat of "[r]etaliatory action against American vessels in foreign ports" which would "probably exacerbate and broaden the present dispute."

In concluding its analysis, the Court arguably applied a test somewhat less expansive in tone than that connoted by the speculative auguries previously set out, and if the twice-used word "therefore" were to be given its full weight, the test might be said to be both clear and exclusive: "Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under *Benz* rather than under *Ariadne*."

In the present cases, the president of Respondent International issued a directive to Union members to suspend the handling of "all Russian ships and all Russian cargoes" in American ports, and subordinate Union officials complied with his order. As in *Windward*, "[a]t the very least" the Respondent Union "must have hoped" to make the use of Russian ships and the carrying of Russian cargo disadvantageous and counterproductive; at the ultimate, as assuredly was also the case in *Windward*, the Union here sought to bring an end to the use of such ships and the

transport of such cargo.[16] Like *Windward*, the end result of the Union conduct, if successful, threatened "more than a negligible impact" on the maritime operations of foreign ships and on the business of foreign entities engaged in Russian trade.

As in *Windward*, "the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country;" the only decision which would mollify Respondents "would have the most significant and far-reaching effect" on the operations of Russian shipowners (i.e., the Soviet government) and on Russian purveyors and purchasers of goods (i.e., the Soviet government); a determination by the Russian authorities to boycott American ports rather than withdraw from Afghanistan "would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as ours;" "[r]etaliatory action against American vessels in [Russian] ports" might follow, which would "probably exacerbate and broaden the present dispute;" and finally, none of the "predictable responses" to the Respondents' conduct "would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate"—indeed, in the present case, the Respondents sought no economic advantage or benefit for its members by the conduct in which they engaged.

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[16] The pickets in *Windward*, as earlier noted, complained of substandard foreign wages which resulted in "extreme damage to our wage standards and loss to [sic] our jobs," and asked the public to "not patronize this vessel" and to "help the American seamen." The objective of the picketing was, in one way or another, to cause a diminution in the use of foreign vessels and an increase in the use of American ships and crews.

Appendix B

After thus parsing, and then tracking, the components upon which *Windward* relied in concluding that the Board was without jurisdiction, it seems to me difficult to reach a different result in the present case. There are, very obviously, factual variations, but I cannot, in laying them next to the *Windward* language, perceive those differences as significant ones. It may seem to me that there would have been a greater theoretical chance for the American unions in *Windward* to have achieved a wage objective (although it is not easy to say that they were doing anything other than attempting to put the foreign ships out of business) than for the present Respondents to have caused the Russian government to withdraw from Afghanistan, but it may certainly be said that the sort of international reverberations about which the Court speculated in *Windward* can equally be conjectured here.

And, of course, none of the "predictable responses" to the present conduct "would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." The Respondents' actions were entirely unrelated to the advancement of the interests customarily served by unions; they were wholly "political" in nature, and in fact detrimental to the immediate interests of longshoremen, by causing a reduction in the work available to them. It would seem a curious thing to hold that a union is *not* involved in "commerce," and not subject to Board jurisdiction, when, as in *Windward,* it pursues a labor-oriented objective, beneficial to its members, by traditional union methods which promise to have an impact upon foreign trade, but *is* in "commerce", and therefore within Board jurisdiction, when it pursues a non-labor-oriented objective by similar methods which promise to have a similar impact.

This latter reasoning appealed to the Court of Appeals for the Fifth Circuit, which held, in *Baldovin* v. *International Longshoremen's Association, AFL-CIO, et al.*, 626 F.2d 445, that the conduct presently under consideration was not in "commerce" within the meaning of the *Benz* family of cases. In *Baldovin*, the Court was considering consolidated appeals from a District Court decision denying a Section 10(1) injunction sought by the Board Regional Director in Houston (here the *Kansas Farm Bureau* case) and from another District Court decision granting such an injunction in Savannah and New Brunswick (presently the *Occidental* case). In concluding that there was not even "reasonable cause" to believe that the Union had violated Section 8(b)(4), the Court reasoned as follows (*id.* at 450-454):

> As we have seen, however, the secondary boycott prohibition was designed to narrow the labor controversy into a confrontation between the primary opponents. If one of those opponents is not subject to the NLRA, for example, because it is a foreign entity or a foreign nation, and if the objective of the union is to obtain concessions of a kind that could not be achieved either by domestic action or by labor disputes of the kind encompassed by the NLRA, the boycott ban would be merely a prohibition devoid of its function. Seeking to restore the secondary boycott provisions to their purpose, the Supreme Court has interpreted the commerce provisions in the statute to import two separate purposes: they set forth the basis for congressional action and the limitation on that action in accordance with constitutional concepts traditionally incorporated by those terms; in addition they limit the

statutory scope of the secondary boycott provisions to those boycotts that could be remedied by domestic action.

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The Board's recent decision in *National Maritime Union of America and Shippers Stevedoring Company*, 245 NLRB No. 29 (1979), is based on the *Windward-Mobile* rationale. In *Shippers Stevedoring* a union representing United States seamen picketed a U.S.S.R. flag ship with signs protesting the use of U.S.S.R. vessels, instead of United States ships, to transport foreign cargo purchased with United States tax dollars in violation of the Cargo Preference Act, 46 U.S.C. § 1241(b)(1). Because the picketing was aimed at replacing the foreign ship and its foreign crew with a United States ship and a United States crew, the Board viewed the picketing as directly affecting the "maritime operations" of the foreign ships. Therefore, the Board found the picketing activities to be not "in commerce" within the meaning of the LMRA.

The Board itself recognized in *Shippers Stevedoring* that the *Windward-Mobile* rationale cannot be confined to union efforts directed toward changing shipboard conditions of employment. The union that was picketing in *Shippers Stevedoring* could not be mollified by a change in shipboard wages or employment conditions, nor would a wage-cost adjustment by the shipowner end the dispute. The Board adopted as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought

about by the entity's response to the activity in question.[17]

* * *

These union activities, a political protest against the political actions of a foreign government, in comparison with the union activities in *Windward* and *Mobile*, are even further removed from the type of domestic labor relations that the Act was intended to cover. *Windward* and *Mobile* cannot be distinguished on the basis of the purely factual differences that the unions were there conducting "area standards" picketing directly against the foreign ships, the unions had a primary labor dispute with the foreign ships and the picketing of the vessels was designed to affect directly the internal labor relations of the foreign ships vis-a-vis their foreign crews. [Footnote omitted.]

In *Windward* as here the union objective was to compel a foreign entity to change a course of action it was taking away from our shores. If the fact that the present dispute is with a foreign government over military policy makes the activity in commerce, while a dispute with a foreign employer over its labor policy would not be in commerce, then the anomalous result would be that an injunction could not issue when labor relations are involved but could issue when they are not.

The mere fact that a boycott or picketing is aimed at a foreign entity does not, of course, *ipso facto* preclude NLRB jurisdiction. [Footnote omitted.] The object of the dispute determines whether or not it is "in commerce." When the dispute is over the hiring of American labor in United States ports, it is "in commerce." When the dispute is over the foreign ves-

[17] *Shippers Stevedoring* will be discussed in greater detail *infra*.

sels' relations with its foreign employees, it is not "in commerce." When the dispute is over a foreign government's invasion of a remote nation, it is more emphatically not "in commerce."

As in *Windward* and *Mobile*, the ILA's activities are outside the coverage of the Act because of the nature of the reasonable responses that would accommodate the union's complaint. Only a political decision on the part of a foreign government can satisfy the ILA's grievance. Thus, the *Windward* rationale as recognized by the Board in *Shippers Stevedoring* compels a finding that the ILA activities do not come within the coverage of the Act. [Footnote omitted.]

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The Supreme Court decisions whose lead we follow were reached by divided courts but they read the LMRA as drawing a domestic-foreign impact line that permits domestic unions to boycott foreign vessels with the purpose of attempting to affect foreign affairs. We attempt but to interpret the congressional intent. If we fail to recognize it, the remedy lies in the hands of Congress.

It is not unmistakably clear that the secondary boycott provision is only "designed to narrow the labor controversy into a confrontation between the primary opponents," or that the provision would be "a prohibition devoid of its function" when applied to a dispute in which the one of the opponents is not subject to the NLRB and the subject of the dispute is incapable of domestic resolution. It has been held that the secondary boycott prohibition is intended principally to protect neutral employers and may apply despite the absence of a conventional primary dispute. E.g.,

National Maritime Union of America, AFL-CIO v. *NLRB*, 346 F.2d 411, 418 (C.A.D.C.). In its principal thrust, however, the Fifth Circuit reads, and approves, *Shippers Stevedoring* as adopting "as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrustion into the affairs of the foreign entity which will be brought about by that entity's response to the activity in question." That formulation appears to me to be a sound reading of both *Shippers Stevedoring*, see *infra*, and *Windward*.[18]

Only recently, the Court of Appeals for the First Circuit has also had occasion to apply *Benz et alia* to a controversy arising from President Gleason's mandate. Reacting to the facts now before me in the *Allied* case, Allied sued the Union for damages in U.S. District Court, urging three separate causes of action. One of these was a claim under Section 303 of the LMRA, which provides a private right of action for violations of Section 8(b)(4). The District Court held that Allied was not entitled to relief under Section 303; in reversing, the Court of Appeals (Senior Circuit Judge Aldrich dissenting) construed the *Benz* line of cases as affording "commerce" jurisdiction to the facts before it. *Allied International, Inc.* v. *International Longshoremen's Association, AFL-CIO*, —— F.2d. —— (January 6, 1981).

The Court read *Benz* through *Windward* (with the exception of *Ariadne*) as "involv[ing] the question whether the Act affirmatively protected union activity directed at

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[18] The Court's other isolated shorthand references to the proper test—"boycotts that could be remedied by domestic action," "the object of the dispute determines whether or not it is 'in commerce'," and "the nature of the reasonable responses that would accommodate the union's complaint"—are evidently subsumed into the more comprehensive statement set out in the text.

the working conditions aboard foreign-flag vessels," and thought that the Supreme Court had decided those cases as it did because "[t]o find that the picketing in *Incres, Benz* and *Windward* was protected by the Act would have implied the jurisdiction of the NLRB over the foreign labor conditions that gave rise to the picketing;" such an implication would, in turn, necessitate inquiry into the "internal discipline and order" of a foreign vessel.

It may be argued that the Court's reading of *Benz, Incres,* and *Windward* is erroneous insofar as it finds in *Windward* merely a desire on the part of the Supreme Court to avoid an implicit claim of Board jurisdiction over the internal order and discipline of a foreign vessel. As earlier discussed, the majority of the Court in *Windward* seemed to agree with the dissent there that it was expanding the exception beyond "the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*" to include, in the underscored words of the dissent, disruptions having an "*economic impact* upon foreign shipping." As I read the majority opinion in *Windward,* its dilation of the possible economic ramifications of the picketing militates against the First Circuit's characterization of *Windward* as reflecting nothing more than a reiteration of the pre-*Windward* doctrine which only attempted, as the *Windward* dissent put it, to preclude "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels . . . ."

Initially, the First Circuit seemed to be concluding that the principal reason for distinguishing *Incres, Benz,* and *Windward* was that, as it happened, no foreign entities were as directly involved as they had been in those cases, and therefore no considerations of comity and accommoda-

tion in international trade obtained: "Here, an American union has ordered its members not to work for an American stevedore which had contracted to service an American ship carrying goods of an American importer, insofar as the work would involve handling goods originating in the Soviet Union. There is no question of interference in the affairs of a foreign employer." Thereafter, however, it becomes clear that the First Circuit was focussing on the absence of a primary "labor" dispute. The Court pointed out that the "primary dispute" before it was between the ILA and the U.S.S.R. over the military policy of the latter, and it "would be absurd to contend that application of the secondary boycott provisions would imply NLRB jurisdiction over *this* primary dispute, *i.e.*, over Soviet military policy" (emphasis in original).

The Court then went on, in the context of a discussion of the effect of the *Mobile* case, to conclude that *Windward* (and, *a fortiori*, *Mobile*) does not apply to the present facts because the "primary" controversy here was not a "labor" dispute. It stated:

> We read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a "primary dispute" cannot be extricated from a "secondary dispute" for purposes of contrary jurisdictional findings.
>
> Here, however, there is no attempt to "bifurcate" the effects of a single union action. The *only* labor-related activity in issue has been played out by an all-American cast. The fact that this domestic dispute was inspired by military events in foreign lands—events far beyond NLRB jurisdiction—does not counsel

> against application of the NLRA to the labor dispute ongoing here at home. In sum, none of the considerations that prompted the Court in cases such as *Windward, Incres,* and *Benz* to find the Act inapplicable have force in this context. [Emphasis in original.]

In a subsequent footnote, responding to the dissenting opinion, the majority emphasized its conclusion that *Benz-Mobile* applies only where a "primary" "labor" dispute exists; since no such dispute could be found here, the problem of "bifurcation" presumably becomes irrelevant: "[W]e think those cases are adequately explained on the principle that in a case involving *intertwined* 'primary' and 'secondary' *labor* disputes, lack of Board jurisdiction over the primary dispute will preclude Board jurisdiction over the secondary conduct—more particularly where a contrary ruling might well suggest an improper interference by the United States in the relationship between foreign employers and laborers" (emphases in original).

If I am interpreting the majority opinion correctly, it did not rely on the *Grain Workers* cases previously described (although it discussed them) to conclude that the instant facts permitted separate consideration of secondary conduct; rather, it held that the *Benz-Windward* prong of the doctrine did not apply at all, since those cases require a threshold finding that the "primary" dispute is "labor"-related in order for any aspect of the dispute to even tentatively qualify for exemption from "commerce." It does seem that, were the primary controversy here a "labor" dispute, the majority might have held that any secondary character of the conduct was not separable ("We read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar

conduct carried out at a single site, a 'primary dispute' cannot be extricated from a 'secondary dispute' for purposes of contrary jurisdictional findings.")

Senior Circuit Judge Aldrich dissented on this count. In his view, the *Benz* line "establishes the general proposition that the NLRA does not reach, directly or indirectly, labor controversies in which the 'primary' dispute relates to the internal affairs of a foreign entity (in those cases, foreign shipowners)." Judge Aldrich believed that the present "primary" dispute fell within that category, and, because of *Mobile*, he found no basis for coverage of the "secondary" aspects of the dispute: "[T]he internal management or affairs of foreign entities are none of the Board's business, directly or indirectly." [19]

2. The Meaning of *Mobile*.

As indicated above, I am inclined to agree with the Fifth Circuit (and Judge Aldrich) as to the general applicability of *Windward* to disputes of the present kind. Had Respondents simply engaged in picketing of Russian ships and cargoes, no further analysis would be required. But certain language in *Mobile* raises a question as to whether the form of action engaged in by Respondents—overt inducement of members not to work on Russian ships and cargoes for secondary employers, rather than primary picketing of such ships and cargoes—requires a different result.

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[19] Judge Aldrich, however, would have held actionable Allied's tort claim in admiralty based on the Union's asserted wrongful interference with existing and prospective business relationships. The majority had held, under analogous Supreme Court precedent relating to the displacement by Section 303 of state law damage actions based on peaceful secondary picketing, that a claim in tort under federal common law also did not survive the enactment of Section 303. See *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252.

Appendix B

Until *Mobile,* the problem of what activity did or did not affect "commerce" for jurisdictional purposes had been treated more or less as an abstract question—given the conduct and either its effect on principles and circumstances of international relationships (*Windward*) or the effect thereon resulting from Board inquiry into the conduct (*Benz* and the others), should the Board be denied authority to regulate (or to refuse to regulate) the conduct? The issue was not evaluated in conventional labor law terms of "primary" or "secondary" disputes or employers, or by examining the relationships between the parties involved in the situations.

In *Mobile,* however, the argument was made that the "commerce" analysis might be affected by the identity of the parties appearing in the state court, thus to some extent introducing labor law party concepts into the jurisdictional question. Given that state court jurisdiction is not preempted when the *foreign shipowner* sues the union for picketing, could that jurisdiction nonetheless be precluded by federal law when *the American stevedoring company* sues the union for interfering with its business by virtue of the same conduct, a conflict which might arguably fall within Section 8(b)(4) of the Act?

The *Mobile* majority said no, pointing out that since the response of the stevedore's employees to the picketing was a "crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected," the "effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same" regardless of which party complains about it. "[A]ctivities" which "plainly were not" "commerce" in *Windward* do not become "commerce" simply because a stevedore or a shipper, rather than a shipowner,

invokes the state court's jurisdiction. The majority rejected "the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its *statutory* authority over unfair labor practices 'affecting commerce'" (emphasis in original). This approach seems to suggest that where the underlying controversy has *Benz* or *Windward* implications, secondary behavior connected with it also falls outside the Board's jurisdiction; if the Board cannot hear a complaint by a foreign shipowner, it also cannot hear a complaint by a stevedore arising from the dispute between the union and the shipowner.

Nonetheless, the Court seemed to preserve the viability of the *Grain Workers* cases, citing them in a footnote and saying that its ruling in *Mobile* "need cast no doubt on those cases which hold that the Board has jurisdiction under §8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is outside the United States." It is argued that this apparent approval defines and limits *Mobile,* marking out the boundaries of certain "secondary" conduct as to which the Board, post-*Mobile,* retains jurisdiction. As previously described, in the *Grain Workers* cases, a Canadian union was engaged in a dispute with Upper Lakes, a Canadian shipping company. To support the Canadian union, an American union induced its members, employees of Continental Grain, an American company, not to load Continental's grain on Upper Lakes' ships while the latter were in Chicago to take on grain at Continental's elevator. The Board, the Seventh Circuit, and the District of Columbia Circuit all agreed that the American union's conduct was in "commerce," not governed by *Benz et alia,* and violative of Section 8(b)(4).

Appendix B

What sort of conduct, if any, was the *Mobile* Court saving for Board jurisdiction "even though the primary employer is located outside the United States?" Putting aside the *Grain Workers* footnote, and examining only the body of *Mobile*, the text seems to suggest a comprehensive, rather than a narrow, ban on assertion of Board jurisdiction over secondary conduct related to a primary *Windward* dispute.

It could, perhaps, be argued that the square holding in *Mobile* is limited to its known facts; that the Court was saying nothing more than that "primary" picketing always subsumes an intention to embroil secondary employers, and since the latter are inherently victimized by the "primary" picketing, and since that picketing has been held to have certain consequences which place it beyond the Board's jurisdiction, to allow the Board an opportunity to examine into the conduct would possibly permit it to inquire into "activities" already adjudged not to be in "commerce."

It could also, and perhaps more persuasively, be argued that the Court was holding that *any* secondary conduct related to the picketing was beyond the Board's jurisdiction; that is the implication of the broad statement that "Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioners' picketing did not even arguably violate § 8(b)(4) of the Act." 419 U.S. at 228.

It is contended, however, that the *Grain Workers* cases noted with apparent approval by the Court authorize Board jurisdiction here because, as in those cases, an American

union has induced employees of American companies to withdraw their services from their employers in order to affect foreign employers. The proffered distinction is that where the union's action is *first* directed against the American employer, by inducement of his employees, the conduct is in "commerce," as in the *Grain Workers* cases, whereas when the union, impelled by the same motivation, directly engages in picketing of the foreign employer, with the underlying purpose of inducing its members who work for a secondary employer to refuse to work, that conduct is not in "commerce," as in *Mobile.* This seems to be the alternative line of argument advanced here by the General Counsel:

> Put another way, when a domestic union's conduct is directed immediately at a foreign person whose operations involve activities both within and outside of domestic "commerce," the inquiry as to whether the conduct is "in" or "affecting commerce" for the purposes of the Act necessarily focuses on the question whether the object of the union's conduct is to affect the domestic commercial activities of the foreign entity, as in *Ariadne,* or to affect its operations extending beyond domestic commerce, as in *Windward-Mobile.* If the former, the Board has jurisdiction; if the latter, the Board's jurisdiction does not lie. However, where, as in *Grain Workers* and in the instant case, a domestic union's conduct is immediately directed at a domestic person whose operations are indisputably in commerce, that conduct is also "in commerce," regardless of whether the union's ultimate object is to indirectly influence the non-domestic commerce activities of a foreign entity.[10]

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[10] Earlier in his brief, General Counsel had taken the position that *Windward* applies only to union action "designed to . . .

General Counsel thus asserts that, even when conduct might ordinarily appear to be *Windward*-excluded from Board jurisdiction, where that conduct is "immediately directed" at a domestic person, the *Grain Workers* cases apply without further consideration of the object of the conduct.[21]

But since *Windward* seems to hold that the question of Board-or-state jurisdiction over certain activity may be determined by an assessment of the impact of the activity itself upon foreign trade, does it make sense, for purposes of determining whether the "activity" is in "commerce" or not, to make the answer turn upon the identity of the party "first" affected by the activity? *Mobile*, and the implication of General Counsel's argument earlier

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directly affect the labor relations of foreign vessels vis-à-vis their foreign crews or otherwise intrude into the maritime operations of foreign-flag ships," and was thus "inapposite to the instant proceedings." The argument quoted above is made on the *arguendo* assumption that *Windward* may also apply to "jurisdictional issues extending beyond the confines of maritime operations of foreign-flag ships."

[21] I have some trouble with this analysis, aside from that set out above, *infra*. For one thing, as we have seen, the *Windward* majority spoke not simply of the union's "object" but also of the foreseeable reverberating effects on the foreign entity and other parts of the trade community, including the United States. For another, the contention that, in the present case, the conduct is "immediately directed" against a "domestic person" rests on the notion that the Respondent International's order to withhold labor has its first impact upon the domestic secondary employers. As the Court pointed out in *Mobile*, however, that same impact characterized that situation: "[T]he response of the employees of the American stevedores was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected." 419 U.S. at 224. It may be said that the order here was not any more "immediately directed" at the stevedores than the picketing in *Mobile*, which was designed, as the Court said, to influence their employees to refuse to work.

quoted, stand for the proposition that had the ILA authorized the use of pickets in the various ports, picketing the Russian ships or cargo as they attempted to leave or arrive, any concurrent secondary motivation for the activities, no matter how blatant, would be outside the Board's reach.[22] If that is the correct proposition, I find it difficult to believe that the Court intended to create such a tenuous distinction—that, in deciding the jurisdiction of the Board over two forms of union activity having the identical impact on foreign trade, it is improper for the Board to assert such jurisdiction when the impact is caused by union picketing of a foreign ship accompanied by the most unmistakable evidence that the picketing has a secondary objective, but it is not improper for the Board to assert jurisdiction when the union omits the picketing and simply engages in secondary conduct. The result of such a rule would be that if the Union wished to opt for state rather than Board jurisdiction during the next Afghanistan, it would order picketing rather than issue a press release (and then, if it desired, within the confines of that picketing, engage in open and notorious secondary conduct).

While it seems unlikely to me that the Court would have attached meaningful weight to such a distinction, the *Grain Workers* footnote in *Mobile* cannot be ignored. The Fifth Circuit in *Baldovin, supra,* 626 F.2d at 453, n. 5, thought that the *Grain Workers* cases were distinguishable from the present situation, but felt that no "bright line can be drawn between them" and the instant boycott, and in

[22] Such as, e.g., picketing having the demonstrable purpose of inducing longshoremen not merely to honor a picket line, but "to engage in concerted conduct against their employer to force him to refuse to deal with the struck employer," *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *NLRB,* 366 U.S. 667, 673-674.

Allied International, Inc., supra, Judge Aldrich said in dissent that despite the Supreme Court's indication that its holding in *Mobile* "need cast no doubt on" the *Grain Workers* cases, "[t]o [his] mind, *Mobile* casts considerable doubt on them." [23]

It may be that the *Mobile* Court saw the following difference between the cases. In the *Grain Workers* cases, a "primary" dispute existed between the Canadian employer and the Canadian union prior to the American union's decision to take action. In one of the *Grain Workers* cases, 376 F.2d 774, 776, the D.C. Circuit said that the "short answer" to the *Incres* contention there made by the union "is that the Board is not here exercising jurisdiction over the Canadian primary dispute, but over secondary activity in this country . . . ." It may be that the

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[23] The Fifth Circuit essayed the following distinctions between *Mobile* and the *Grain Workers* cases:

> The American union's objective was to prevent the American employer from doing business with the Canadian shipper and thus to embroil the American employer in the foreign labor dispute. The objective was to influence action in the United States, not abroad. The union activity was designed to affect directly the American employees in their relationship with their American employer, thus bringing the *Grain Elevator* cases more closely in line with *Ariadne*, where the Act was applicable, than with *Windward*, where the Act was inapplicable. While we think that the *Grain Elevator* cases are distinguishable from the present cases, the distinction is solely one of degree and we cannot say that a bright line can be drawn between them and the present cases.

In *Allied International, supra,* the First Circuit discussed the *Grain Workers* cases, but did not seem to rely heavily on them or on any purported dissimilarity between picketing and a "hot cargo" order; as described above, the Court thought *Mobile* applied to oust Board jurisdiction of secondary conduct only where the Board has no jurisdiction of the primary dispute "in a case involving *intertwined* 'primary' and 'secondary' *labor* disputes" (emphasis in original), which is not the present case. The Court thus did not reach the *Mobile* issue.

Mobile majority felt that secondary American conduct relating to an extant and active controversy between foreign disputants could not have the same potential for disruption of foreign commerce as might be engendered by a freshly-created direct dispute between an American union and a foreign entity.

I merely speculate; the Court did not indicate that its footnote was based on such a theory. It should be kept in mind, in appraising this footnote and its meaning, that the *Grain Workers* reference was, after all, *obiter dictum;* since the allusion to those cases was unnecessary to the decision, it cannot be regarded as a thoroughly considered definition of the dimensions of *Mobile.* For the reasons previously given, I am inclined to conclude that (1) the *Grain Workers* cases were thought by the Court to be applicable only to an ongoing foreign primary dispute, on the reasoning suggested above, or (2) the footnote approval of those cases does not represent a mature consideration of their implications, as previously discussed.

3. The Relevant Board Cases.

Two cases decided by the Board bear on the present issue.

Respondent ILA has engaged in boycotts for "political" purposes before, and in *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.),* 146 NLRB 723, the Board was confronted with the first of these. On that occasion, in 1962, ILA issued a press release setting out the steps it was taking to eliminate trade with Cuba, including a determination not to "load or unload cargo of any nature in ships of any owner whose vessels are used in trade with Cuba." An ILA local accordingly refused to refer employees to a Maryland steve-

dore to fit the Tulse Hill, a blacklisted foreign ship manned by foreign nationals.

In holding that the respondent unions had violated Section 8(b)(4) as charged, the Board made a footnote rejection of the respondents' contention that the Board was without jurisdiction because "the Tulse Hill is a foreign-flag vessel manned by an alien crew." The Board, citing *Incres* and other cases, stated (146 NLRB at 724, n. 3), "As the instant proceeding involves no issue bearing upon labor relations aboard the Tulse Hill, its registry and the composition of the vessel's crew are immaterial in determining the Board's power to entertain Ocean's unfair labor practice charges against Respondents." [24]

I do not view the Board's evaluation in *Ocean Shipping* of its jurisdictional authority as necessarily binding upon me. That case was decided in 1964, and while the Board accurately reflected the reach of *Benz-Incres* at that time, it may fairly be said that *Windward* and *Mobile,* handed down 1974, represent an extension of the doctrine, beyond the "labor relations" of a foreign vessel, which renders *Ocean Shipping* obsolete to that extent.[25]

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[24] On review, a panel of the Fourth Circuit, Judge Bryan dissenting, reversed the Board's finding of violation on the ground that the Board has no jurisdiction over controversies which are not "labor disputes" as defined in Section 2(9) of the Act. The panel majority also went on to hold that Section 8(b)(4) was inapplicable to the dispute for other reasons. 332 F.2d 992. Soon thereafter, the Board expressed disagreement with the Fourth Circuit's holding that a "labor dispute" is a prerequisite to Board jurisdiction under Section 8(b)(4), *National Maritime Union of America (Weyerhaeuser Lines),* 147 NLRB 1317, and, since then, several courts have indicated disapproval of the Fourth Circuit's position, e.g., *National Maritime Union of America* v. *NLRB,* 346 F.2d 411, 415 (C.A.D.C.).

[25] The same staleness consideration applies to the Board's assertion of jurisdiction in one of the *Grain Workers* cases, decided in

Appendix B

A recent Board decision, on the other hand, must be deemed a more timely assessment of current Supreme Court authority. In *National Maritime Union of America (Shippers Stevedoring Company), supra,* 245 NLRB No. 29, decided in 1979, the claim was successfully advanced by the respondent union that *Windward-Mobile* displaced Board jurisdiction of the dispute. There, a union which represented American seamen picketed, in the port of Houston, a Russian-owned vessel carrying a cargo of German-built automobiles. The underlying grievance was ostensibly that the carriage of such cargo by the Russian ship violated a United States law requiring that half of all cargo funded by a United States government agency be transported in American-flag vessels.[26] Picket signs protested "Sending U.S.A. Tax Dollars to Support U.S.S.R. Merchant Fleet." ILA longshore employees requested by the charging party stevedoring company did not report for work during the picketing. The General Counsel issued complaint under Section 8(b)(4)(i)(ii)(B). The union argued that the Board was without jurisdiction.

After liberally quoting *Windward* and *Mobile,* the Administrative Law Judge held concisely:

> The General Counsel argues that since the picketing in the instant case was not directed at the employer-employee relationship of the Skulptor Golubkina, the Supreme Court's opinions in *Windward* and *Mobile*

1965. *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Association, Local 418, AFL-CIO (Continental Grain Company),* 155 NLRB 402, 403, n. 6.

[26] Other evidence, however, suggests that the union was more generally attacking the use of foreign vessels to transport American-purchased cargo.

are not dispositive of the issues in this case. I disagree.

The Court in *Windward* set forth in effect that virtually none of the predictable responses of a foreign shipowner to picketing of the *Windward* type would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. The facts in the instant case warrant, in my opinion, even more so such a conclusion and, similar to the Court's opinions in the *Windward* and *Mobile* cases, the picketing of the Skulptor Golubkina was not "in commerce" as defined by the Act.

Thus, I find it clear that the picketing activities of the Union directed to the foreign-flag ship, Skulptor Golubkina, was not picketing "in commerce" within the meaning of the LMRA. The *Mobile* case reveals that a bifurcated view of such "commerce" was not permitted as regards employers, employees, or persons loading or unloading such commerce, and that such picketing activities as regards such employers, employees, or persons were not covered by the Act.

In adopting the recommendation of the Administrative Law Judge to dismiss the complaint, the Board indicated no reservations about his rationale or result.

It should be noted that in rejecting the General Counsel's contention that *Windward* and *Mobile* were not controlling because the picketing was "not directed at the employer-employee relationship" aboard the vessel, the Administrative Law Judge did so by relying on that portion of *Windward* which adverted to the determination that "none of the predictable responses of a foreign shipowner to picketing of the *Windward* type would be limited to the

sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." The Charging Parties in *Kansas Farm Bureau, et al.* vigorously attack this analysis as an unwarranted truncation of the more comprehensive *ratio decidendi* set forth in the *Windward* case.[27] I must say that in the context of *Shippers Stevedoring,* I am not sure what one might consider to be the projected "predictable responses" of the Russian government, which owned the vessel; the evidence makes it clear, in my view, that the protest was really directed at the United States Department of Transportation.[28] Nonetheless, the ultimate objective of the picketing was to affect the choice of vessels used to transport American goods, and thus to influence adversely the future operations of many foreign vessels in the American trade (including, but not limited to, the Russian vessel involved in the case).

If I were to conclude that the Board, in *Shippers Stevedoring,* has approved a test under which jurisdiction is measured by the single question of whether or not the predictable responses of a foreign entity to a union's antagonistic conduct might extend beyond the kind of "wage-cost decision benefiting American workingmen which the LMRA was designed to regulate," I would have to say, as to the present cases, that the predictable responses here plainly would so exceed that kind of decision, and hence the Board would be without jurisdiction (unless *Mobile*

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[27] On the other hand, the Charging Party in *Occidental Chemical Company* believes that the Administrative Law Judge in *Shippers Stevedoring* "correctly thought this fact important because it illustrated why, under the particular circumstances of the case, the test for Board jurisdiction, absence of conflict with foreign labor and maritime laws or policies, was *not* satisfied" (emphasis in original).

[28] See *Shippers Stevedoring,* ALJD pp. 5, 7, 8.

permits jurisdiction because of the nature of the present conduct). If I were to assume that the Board *sub silentio* applied a broader test, assaying, as the Court seemed to do in *Windward,* the substantiality of the international ramifications of the conduct, it would follow that the Board thought that the picketing, which ultimately sought a reduction of unspecified foreign vessels used to transport American cargo, portended the sort of consequences which brings union conduct within the *Windward* exemption.[39] Either analysis, it seems to me, tends to argue for also finding absence of jurisdiction in the present case (prescinding, again, the *Mobile-Grain Workers* issue, to which I now turn).

The net result of *Shippers Stevedoring* was to hold that the Board could not "bifurcate" the case and find Section 8(b)(4)(i)(ii)(B) applicable, regardless of the assertedly unlawful conduct in which the union had engaged. Although the General Counsel had attempted to establish a separable objective of ensnarement of the longshoremen scheduled to unload the vessel, the Administrative Law Judge refused to consider or analyze the evidence pertinent to this contention, despite his conclusion that the sole objective of the picketing was secondary in nature.[40] In do-

[39] The *Kansas Farm Bureau et al.* Charging Parties suggest that *Shippers Stevedoring* was an ill-considered decision, probably because released in the well-known end-of-the-fiscal-year "flurry" of Board decisions. I note, however, that the Board did not adopt the Administrative Law Judge's decision until some 8 months after its issuance, an unusual delay which arguably indicates that the Board paid careful attention to the problem. As I read Occidental's brief, it finds no fault with the result in *Shippers Stevedoring.*

[40] The Administrative Law Judge found that "the only objective in the picketing was to cause employers or employees who were involved in or were assigned to or were unloading the Skulptor Golubkina to cease doing so."

ing so, he seemed to be holding that whether or not a separable secondary violation might be found within the confines of "the picketing activities of the Union," any such conduct would be too enmeshed with the activity already determined to be not in "commerce" to permit independent consideration and adjudication. The complaint was thus dismissed without any examination into the possibility of a distinct unfair labor practice being contained within the general boundaries of the primary picketing.[21]

In my view, *Shippers Stevedoring* goes a long way toward dictating a like result in the present cases.

4. The Positions of the Parties.

Perhaps indicative of the anfractuous character of the present issue are the positions enunciated by the General Counsel and the Charging Parties in each case. As I read their analyses, and I hope that I do not misrepresent them, none of the proponents of the violations charged quite agrees with any other about the appropriate rationale for finding the existence of Board jurisdiction here.

I have earlier discussed General Counsel's interpretations of *Windward* and *Mobile*. The brief submitted by the Charging Parties in *Kansas Farm Bureau et al.* would limit *Windward-Mobile* to conduct relating to union "interference with the maritime operations of foreign vessels" and no more; since, these Charging Parties contend, Respondents have not "taken any steps, including picket-

[21] In *Baldovin, supra*, as set out previously, the Fifth Circuit accorded great weight to *Shippers Stevedoring*, construing it to "adopt [ ] as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought about by the entity's response to the activity in question."

ing, designed to affect foreign maritime operations," and such interference "is neither an object of the union's conduct here nor an essential part of the mechanism through which the union intends to achieve its objectives," the Supreme Court cases do not apply. I am unable to agree with this contention.

Perhaps the argument is more esoteric than I recognize, or perhaps it is an effort to hold the union to its claim that it had no desire to interfere with anyone's business, but I cannot find any basis for the assertion that President Gleason's order did not intend to interfere with, *inter alia*, the maritime operations of foreign vessels. Elsewhere, these Charging Parties state that the Board has "recognized that the secondary effects of a political boycott are necessarily the *heart* of such union conduct" (citing *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.), supra*), and it seems clear that imputing such secondary intentions to the Union cannot be done without also imputing an intention to have an impact upon foreign trade.

The brief for the Charging Party in *Occidental* summarizes:

> [In *Windward* and *Mobile*,] [t]he one respect in which the Court extended the earlier decisions was in broadening the area in which principles of comity would come into play. As the *Windward* Court observed, "[t]he picketing activities in this case do not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*." 415 U.S. at 113. Instead of excluding from the Board's jurisdiction only those cases in which there was an "inescapable" conflict with the labor and maritime laws

> and policies of a foreign government, Congress, the Court concluded, also intended to exclude from the Board's jurisdiction those disputes in which conflict with foreign labor and maritime laws and policies was merely likely. An increased sensitivity to the need to avoid conflict with foreign labor and maritime laws and policies clearly does not indicate that the Court abandoned its view that the presence of such conflicts was the touchstone for determining the jurisdiction of the Board. (Footnote omitted.)

The problem with this formulation is the assertion that after *Windward,* the litmus test was still limited to the existence of "conflict with the labor and maritime laws and policies of a foreign government." My reading of *Windward,* consistent with Justice Brennan's, is that the Court moved beyond the possibility of that kind of conflict and incorporated, as well, the possibility of substantial adverse economic impact on a foreign party and foreign trade.

Finally, Allied International, Inc., argues:

> Allied reads the essence of *Windward* and *Mobile Steamship* as being that considerations of comity demand that union action that has the intent including foreseeable consequences of requiring a foreign entity to make a significant management decision be deemed to be not "in commerce" within the meaning of the NLRA . . . . In short, the Board loses jurisdiction only because it is foreseeable that the union's conduct can achieve its intended effect of significantly and directly affecting a foreign management decision. If it is foreseeable that the Union's conduct will be totally ineffective in achieving its foreign objective then there

is no underlying comity interest to be served by withholding NLRB jurisdiction . . . . No reasonable person could possibly believe that the ILA's boycott will foreseeably have the slightest chance of forcing Russia to abandon its invasion of Afghanistan . . . . If the test for whether the Board does or does not have jurisdiction is to be the foreseeable effects of the union's conduct upon foreign nations or nationals as compared to Americans, then it becomes not at all "anomalous" that in some situations the Board would have jurisdiction when the primary dispute was not a labor dispute but would not have it in other situations when the primary dispute was a labor dispute. See *Baldovin* supra p. 2554 of 105 LRRM. The question of whether or not the primary dispute is a labor dispute has absolutely nothing to do with the fundamental principles of comity and accommodation in international trade upon which *Windward* and *Mobile Steamship* are predicated. By way of contrast, the foreseeable results or lack thereof of the union's conduct upon foreign governments and foreign nationals has everything to do with those fundamental principles of comity and accommodation.

Allied thus accepts that the *Windward* principle may apply where "foreign governments and foreign nationals," not simply foreign shipowners, are affected by union conduct. Further, it recognizes that *Windward* addressed the foreseeable consequences of domestic union conduct upon foreign enterprises. It errs, I think, in saying that *Windward* applies only where the union's ultimate objective is capable of achievement. *Windward's* analysis concerned itself with the effect of picketing activities which "directly

affect" foreign maritime operations. There is no reason to believe that the "commerce" question should rise or fall on the issue of whether the union will be eventually gratified in its ultimate goal. When an immediate *Windward* impact is threatened against a foreign employer, there would seem to be as much of an "underlying comity interest to be served" by withholding Board jurisdiction as there was in *Windward,* regardless of the unlikelihood of union success in attaining its final objective.

Finally, Respondents argue that what is determinative on the "commerce" question is "the character of the dispute," and that when the dispute is about a "foreign government's invasion of a remote nation, it is . . . emphatically not" in "commerce." This argument does not, it seems to me, track with total fidelity the *Windward* decision, which engaged in a detailed speculative investigation of the economic consequences of the union's conduct there, examining the "predictable responses" of the employer and weighing, as well, the absence of benefit to American workingmen from that conduct.

Concluding Discussion

It is my obligation, of course, to apply the law consistently with the guidance provided by the Supreme Court and the Board. As I understand that guidance in the light of the *Windward* gloss on *Benz,* and the *Shippers Stevedoring* gloss on *Windward,* union conduct which is intended to disrupt foreign commerce and its instrumentalities, and which has the real capability of disrupting such commerce to a meaningful extent and beyond any immediate domestic benefits which could accrue to American workers, is not within the reach of Board jurisdiction, but rather is ex-

clusively subject to state laws.[11] In the present case, it was clearly the purpose of Respondents to significantly subvert the foreign trade engaged in by the Soviet Union, and the Union conduct to that end threatened the sort of ramifying consequences, affecting the Russian economy, without countervailing and limited benefit to domestic workers, to which *Windward* referred. Accordingly, *Windward* and *Shippers Stevedoring* both apply, unless the *Grain Workers* citations by the *Mobile* Court argue to the contrary.

In my view, the approval in *dicta* of those cases was either confined to their particular facts, distinguishable from the present situation, or cannot be construed as a considered disposition of the issue. I do not believe that the Supreme Court, *in determining whether Board or state law should apply to union activities,* would hold that the Board may assert jurisdiction when, as here, the union orders its members not to work for secondary employers, even though, under *Mobile,* the Board would be without jurisdiction if the union simply chose to accomplish the identical end by picketing, including the sort of picketing which the Board might otherwise consider to constitute a violation of Section 8(b)(4). There is no reason to believe that the Court would, *for purposes of assigning jurisdiction,* attach any weight to such a nebulous and controllable distinction. And further, as discussed, it appears to

[11] The logic of *Windward,* I think, compels a conclusion that the doctrine is not confined to conduct affecting "the maritime operations of foreign ships," but extends to foreign commerce in general. If, as here, a union intends to affect, *inter alia,* the operations of a foreign purveyor and purchaser of goods, the same sort of spiral of economic consequences is entailed as that envisioned by the *Windward* Court. I further note that *Windward* described *Benz* as demonstrating a reluctance by the Court to intrude domestic law into the complexities affecting "foreign trade." 415 U.S. at 110.

me that *Shippers Stevedoring* holds that if the "primary" dispute falls within *Windward,* separable secondary conduct in support of it falls within *Mobile.*

I shall, accordingly, recommend dismissal of the complaints in all three cases. The special facts in *Allied International* do not, I think, warrant separate treatment. No foreign vessels or crews were, it is true, involved in the *Allied* case; but the targeted Russian cargo sufficiently embroils a foreign government so as to bring the *Allied* situation within the reach of *Windward.*

As noted long ago, I cannot discern any great practical significance, from the point of view of the nongovernment parties, in whatever result is reached in these particular cases. As far as I can see, if the Labor Board is not available to the Charging Parties, the state courts then become the forum to which they turn. I am, I must say, rather puzzled as to why the Charging Parties have championed with such vigor the Board's exclusive jurisdiction over this subject matter, and equally puzzled why the Respondents have so fiercely resisted that jurisdiction. It would appear that secondary employers might prefer, in this area, as much access to the state courts as possible, since not only do state laws seem to be less protective of unions engaged in this sort of activity,[33] but also the employers invoking state laws are entitled to do so without having to convince a public prosecutor. Undoubtedly, however, the parties all

[33] While the Supreme Court held in *Local 20, Teamsters Union* v. *Morton, supra,* 377 U.S. 252, that state laws awarding damages against peaceful secondary picketing are supplanted by Section 303 of the Act, states would presumably be allowed *pro tanto* to award damages under their laws whenever it is held that union conduct is not "activity affecting commerce," a prerequisite to the application of Section 303.

have good reasons for the postures they have taken in this litigation.[34]

Having concluded that the Board is without jurisdiction, I need not dwell on the further issues presented. I would say, however, after preliminary consideration, that it is probable that the Board would find the principal violations alleged and that the First Amendment claims advanced by Respondents are not well-taken. Recognizing that some higher authority might disagree with my conclusion on the jurisdictional issue, I have made, I believe, all factual and inferential findings which would be necessary or useful in further processing of the cases.

Conclusions of Law

1. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

2. The activities complained of herein are not in "commerce" within the meaning of the Act, and the complaint must therefore be dismissed for want of jurisdiction.

Upon the foregoing findings of fact and conclusions of law, I issue the following recommended:[35]

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[34] It also appears that arbitral relief may be available in such a situation. In Houston, in February 1980, an arbitrator found that the boycott violated the no-strike provision of the bargaining agreement, and ordered the two ILA locals and the District to desist from participating in it.

[35] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Appendix B

ORDER

The complaint is hereby dismissed.

Dated: Washington, D.C., March 16, 1981

/s/ BERNARD RIES
Bernard Ries
Administrative Law Judge